Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

YVONNE G. TROUT, CLARA PERLINGIERO, ET AL.,
PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Austria v. Altmann*, 541 U.S. 677 (2004), interpreting *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), controls waivers of sovereign immunity by the federal government so that the waiver in Section 114(2) of the Civil Rights Act of 1991 applies to the federal government's assertion of a sovereign immunity defense after the passage of the Act?

2. Whether the lower court disregarded *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and adopted a definition of "claim" contrary to that used by ten other circuits when, instead of defining "claim" as a "cause of action," the lower court treated a request for pre-November 21, 1991 prejudgment interest within a single cause of action as a separate "claim" that was factually and legally distinct from the underlying backpay on which the interest was based.

PARTIES TO THE PROCEEDING

Petitioners: Susan L. Alf, Dorothy M. Amendolair, Sandra M. Aquino, Judy M. Bedell, Sandra H. Bennett, Margaret Bents, Lavon Boisen, Patricia A. Boyd, Anna L. Bradford, Marie M. Broughton, Nancy J. Brown, Ellen Callier, Claire C. Chong, Carole A. Clum, Lyndall Chambers Dally, Ellen S. Davis, Patricia Deroche, Anne W. Eakin, Lorene Tuggle Fields, Frances S. Fiorillo, Latricia A. Fleetwood, Patricia H. Fox, Sandra R. Gaskins, Barbara C. Gibson, Marjorie K. Groover, Crystal G. Halicki, Janice M. Harlow, Shirley E. Harris, Carolyn Harwood, Marilyn J. Herrington, Rosie B. Hopkins, Essie D. Horton, Linda L. Jackson, Suzanne A. Jafari, Joyce J. Jenkins, Donna H. Johnson, Pearl M. Jones, Delores A. Kelly, Rose H.Y. Kim, Caroline J. Kratz, Vernice Lee, Thelda MacMillian, Flora C. Malterud, Janice K. Mengel, M. Frances Miles, Helen E. Miner, Edith L. Nankivel, Bernice W. Nelson, Judith J. Newton, Joanne Kelly O'Malley, Danice G. Owens, Clara A. Perlingiero, Catherine E. Quade, Helen D. Reveley, Kay E. Rouse, Susan K. Russell, Kathleen N. Schabacker, Ruby E. Smith, Susan Stanhope, Ruby G. Stough, Faye G. Tolliver, Kristen K. Trimble, Carole A. Velvin, Andrea Dean Wallace, Brenda J. Weaver, Sharon K. Woods.

Respondents: Secretary of the Navy and Commanding Office Naval Command Systems Support Activity.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

YVONNE G. TROUT, CLARA PERLINGIERO, *et al.*,

Petitioners,

v.

SECRETARY OF THE NAVY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, sixty-seven prevailing plaintiffs, respectfully petition for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 2, 2008. App 1a-14a.[1] Petitioners timely filed a Petition for Rehearing and Suggestion for

[1]References to the Appendix to this Petition are the page number followed by "a."

Rehearing *En Banc*, which were denied on November 19, 2008. App 41a & 42a.

OPINIONS BELOW

The court of appeals opinion, affirming the trial court's judgment, is reported at 540 F.3d 442 (D.C. Cir. 2008). App 1a-14a. The orders of the court of appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* are not reported. App 41a-42a.

The district court's December 15, 2006, decision denying Petitioners' Motion for the Award of Attorney's Fees and Costs was published at 464 F.Supp.2d 25. App 15a. The district court's July 22, 1998, Memorandum Opinion and Orders granting plaintiff's motion for the award of interest on backpay and attorney's fees are not reported. App 35a-40a.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2008. The court of appeals denied the Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

The first statute at issue is Section 114(2) of the Civil Rights Act of 1991, which amended Section 717(d) of the Equal Employment Opportunity Act of 1972, read as follows:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, **and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.** (emphasis added.)

42 U.S.C. Section 2000e-16(d) (2002).

The second statute at issue is Section 113 of the Civil Rights Act of 1991, 42 U.S.C. §2000e-5(k), which states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee (including expert fees) as part of the costs...."

STATEMENT

1. Initial Proceedings

Petitioners prevailed on a one-count sex discrimination lawsuit under Title VII based on an undisputed disparity in salaries between similarly situated men and women. U.S. District Judge Harold H. Greene found class-wide liability. *Trout v. Hidalgo*, 517 F. Supp. 873, 878 (D.D.C. 1981). Judge Greene ordered relief. *Trout v. Hidalgo*, 1981 WL 416 (1981).

The court of appeals affirmed the finding of class-wide liability. *Trout v. Lehman*, 702 F.2d 1094, 1106 (D.C. Cir. 1983). This Court granted the Navy's Petition for *Certiorari* and summarily vacated and remanded for "findings of fact, based on new evidence if necessary." *Lehman v. Trout*, 465 U.S. 1056 (1984).

Justice Stevens, writing in dissent, prophetically stated:

> The Court's action today encourages the kind of litigating strategy that gives the party with the greater resources a significant advantage unrelated to the merits of the case. The kind of casual command to begin anew that is reflected in today's order tends to undermine the ability of trial judges to exercise firm control over the progress of litigation.

Id. at 1061 (footnote omitted).

2. Proceedings Following Remand From This Court

On remand, the district court again found the Navy liable for sex discrimination. *Trout v. Lehman*, 652 F. Supp. 144 (D.D.C. 1986). On November 27, 1991, Judge Greene ordered the Navy to comply with the relief awards to sixty-seven class members. *Trout v. Garrett*, 780 F. Supp. 1396 (D.D.C. 1991). The district court ordered interim backpay of $670,402.75 through April 30, 1979, to class members. *Id.* at 1412 n.30. It also ruled that class members were entitled to additional backpay from 1979 "through the present." *Trout v. O'Keefe*, 144 F.R.D. 587, 597 (D.D.C. 1992).

The Civil Rights Act of 1991 became law on November 21, 1991, while *Trout* was still pending on the merits, days before the November 27, 1991 decision discussed above. In response to *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), Congress enacted Section 114(2) of the Act to compensate for delay in

payment, stating: "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." *See* H.R. Rep No. 40. 102d Cong., 1st Sess., pt. 1 at 87 (1991). It is undisputed that Section 114(2) provides the express waiver of sovereign immunity that *Shaw* found lacking.

On January 22, 1993, the Navy agreed to provide additional backpay through December 31, 1991. The December 31, 1991 date was chosen because plaintiff's expert witness calculated continuing, statistically significant salary disparity based on gender from 1970 through December 31, 1991. R. 549.[2]

2. Proceedings Following Passage of the 1991 Act

On September 20, 1993, the parties reached a tentative settlement of all claims by class members. Joint Stipulation of Settlement. R. 553. The district court held a "fairness hearing" and on November 22, 1993, approved settlement of backpay through December 31, 1991. R. 569. Petitioners thus became "prevailing parties" with the entry of the Consent Decree.

This Court was considering two cases interpreting the impact of the Civil Rights Act of 1991 on the date of the "fairness hearing." *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Therefore, the Joint Stipulation of Settlement explicitly reserved the issue

[2]"R" denotes the corresponding numbered entry in the district court's docket.

of whether class members would be entitled to prejudgment interest on backpay and interest on attorney's fees. R. 553.

The Navy did not determine its position on the availability of costs and interest on backpay and interest on attorney's fees until after this Court decided *Landgraf*. After *Landgraf*, the Navy filed a Notice to the Court that said: "Section 114's provision of interest on backpay and attorney's fees against the United States is not retroactive. Interest on the full amount of both backpay and attorney's fees **begins to run as of the effective date of the Act**, November 21, 1991." Navy's Notice to the Court, R. 586 (emphasis added). There is no dispute that Section 114 of the Civil Rights Act of 1991 applies to the *Trout* litigation after November 21, 1991 and that *Trout* class members are entitled to at least some pre-judgment interest on backpay.[3]

On May 10, 1995, Judge Greene approved stipulations to pay prejudgment interest on Petitioners' backpay and attorney's fees after November 21, 1991. R. 597; R. 598. Those stipulations expressly stated that they did not resolve Petitioners' outstanding claims for interest prior to November 21, 1991, as contemplated by the Consent Decree. R. 597; R. 598. Judge Greene then stayed a ruling on the pre-November 21, 1991 interest issue pending a decision in *Brown v. Secretary*

[3]The Navy acknowledged that Section 113 of the 1991 Act, which governs compensation of expert witnesses, applied to the *Trout* litigation for services rendered prior to November 21, 1991. Notice to the Court, R. 586.

of Army, 78 F.3d 645, *reh'g denied*, 86 F.3d 225 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996). R. 599.

On July 22, 1998 and August 12, 1998, the district court ordered defendants to pay prejudgment interest on backpay and attorney's fees prior to November 21, 1991. App 35a-40a. Judge Greene observed that the equities supported an interest award due to delays caused by the Navy's litigation strategy. Judge Greene stated: "On November 22, 1993, the court approved a stipulation of settlement in this protracted Title VII litigation. It took twenty years to reach the point of settlement because the defendant insisted on opposing, appealing and moving to re-open already-litigated issues at every turn." App 35a.

Distinguishing the outcome in *Brown*, Judge Greene wrote:

> Limited to its facts, the rule of *Brown* applies only to cases in which the merits of the underlying action were completed prior to November 21, 1991. Because the instant case was very much alive and being actively litigated on that date, *Brown* is not dispositive and plaintiffs are entitled to prejudgment interest on attorney fees.

App 36a-37a (footnote omitted). Judge Greene also observed: "This case is the classic paradigm where prejudgment interest is appropriate; a Jarndyceian case that has taken on a life of its own and, more importantly, been a constant presence in the lives of the plaintiffs and on the docket of this Court." App 38a (footnote omitted).

Judge Greene died prior to entering final judgment and the case was transferred to U.S. District Judge Paul L. Friedman who ordered prejudgment interest calculated at the prime rate. R. 659. Judge Friedman entered final judgment on July 17, 2001, awarding $8,627,276.50 in interest on backpay and $1,477,020.90 in interest on attorney's fees. R. 666.

3. The Court of Appeals 2003 Decision and the Petition for *Certiorari*

The court of appeals relied heavily on *Brown* in reversing the district court and in interpreting the express Congressional waiver of sovereign immunity in Section 114(2), although the facts and issues in *Brown* were different from those in Trout.[4] *Trout v. Secretary of the Navy*, 317 F.3d 286 (D.C. Cir. 2003).

The court of appeals applied a "completed" conduct test to the acts of discrimination rather looking to the date of entry of the judgment which finalized payment of long-delayed backpay awards. 317 F.3d at 290-292. It held: "It is of no relevance whether the liability phase or the merits phase of the litigation was pending when Section 114(2) became effective." 317 F.3d at 292. The court of appeals concluded "the conduct underlying the complaint, rather than the

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[4]The *Brown* panel observed that "litigation on the merits of Brown's claim was **completed** and the attorney's fee incurred before the statute became effective." 78 F.3d at 654 (emphasis added). Brown's final judgment by the district court was entered in 1989 and was affirmed on the merits in 1990. *Brown* then sought retroactive application of Section 114(2); no statutory right to prejudgment interest existed when judgment was entered in his favor. *Id.* at 647.

procedural posture of the litigation, has significance in this context." 317 F.3d at 291-292.

After denial of a Motion for Rehearing and a Suggestion for Rehearing *en Banc*, the *Trout* class filed a Petition for Writ of *Certiorari* with this Court. The Court denied the petition on November 3, 2003. 540 U.S. 981.

This Court decided *Austria v. Altmann*, 541 U.S. 677 (2004), on June 7, 2004. The *Trout* class then filed a Petition for Rehearing accompanied by a motion for leave to file the petition out of time. In the motion, Petitioners said they had not timely filed a petition for rehearing inasmuch as grounds for such petition did not exist before *Altmann* was decided.

By letter dated November 1, 2004, this Court denied the "motion of petitioner for leave to file a petition for rehearing." App 43a. This Court never denied the petition for rehearing itself and thus did not address the argument made by Petitioners that *Altmann* provided the rule of decision.

5. The Proceedings on Remand

On remand, the *Trout* class filed a Motion to Dismiss Defendant's Claim for Recoupment and for a Stay of Proceedings. R. 676. The *Trout* class argued that the Court is not precluded from awarding pre-November 21, 1991 interest under the "law of the case" doctrine or the "mandate rule" because the Court's decision in *Austria v. Altmann* constitutes an

intervening change in the controlling law.[5] The Navy sought a refund of funds paid to class counsel to litigate the issue of pre-November 21, 1991 interest and funds paid to an expert retained by Petitioners' counsel at the direction of the district court to calculate the amount of interest due. R. 673 ("Motion for Final Determination of Attorneys' Fees and Costs Owed to the Plaintiff").

The district court ruled that *Altmann* did not constitute "an intervening change in controlling law that affects the court of appeals' reversal." *Trout v. Winter*, 464 F. Supp.2d 25, 33 (D.D.C. 2006). App 31a. The district court construed the language in the court of appeals remand to the district court for "final determination of the costs and fees **owed to** the Trout class," 317 F.3d at 293, (emphasis added), as authorizing the district court to deny fees to the plaintiff class and to require the class and their counsel to refund costs and fees previously paid by the federal government from the Judgment Fund for litigating the pre-November 21, 1991 prejudgment interest issue. App 28a.

Stating it was relying on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and two decisions from the D.C. Circuit, the district court held that the *Trout* class was not entitled to recover fees for litigating the prejudgment interest issue because the prejudgment interest issue was a claim distinct from the underlying Title VII litigation. App 22a-24a. The district court

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[5]Where there is an intervening Supreme Court decision changing the law, the law of the case doctrine does not apply. *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996) (citation omitted).

expressly ruled that the Petitioners' request for pre-November 21, 1991 pre-judgment interest was "distinct from their successful Title VII litigation," App 27a, thus, in effect, finding that Petitioners lost their status as "prevailing parties" on the prejudgment interest issue of their one issue lawsuit. The district court indicated it lacked discretion to award any attorney's fees litigating pre-November 21, 1991 prejudgment interest. The district court ordered Petitioners and their counsel to refund payments previously made for attorney's fees, plus interest. App 32a-33a. The district court also required Petitioners to return to the federal government payments previously made to Petitioners' expert, who was retained at the direction of the court. App 28a-29a.

6. The Court of Appeals Decision in 2008

The court of appeals rejected Petitioners' argument that *Altmann* constituted an "intervening change in law" and ruled *Altmann* was "inapposite." App 2a. The court of appeals stated: "We find nothing in *Altmann* that alters the rule under *Landgraf*. *Altmann* expresses no disagreement with the decision in *Landgraf*." App 9a. Since it determined that the Court's decision in *Altmann* was "specific to the statute in that case," the court of appeals concluded: "*Altmann* has no effect upon the holding in *Landgraf* and consequently this Court's decision in *Trout IV* [*Trout v. Secretary of the Navy*, 317 F.3d 286 (D.C. Cir. 2003)] stands." App 9a-10a.

The court of appeals affirmed the district court's ruling that under *Hensley*, the plaintiff class could not be paid attorney's fees or costs for litigating the pre-

November 21, 1991 prejudgment interest issue, even if reviewed *de novo*. App 13a. Said the court of appeals: "because the interest **issue** is distinct from the **issue** of sex discrimination, we affirm the district court's rulings." App 2a (emphasis added). In doing so, the court of appeals found interest was a distinct issue within the single cause of action brought by the plaintiff class. The court of appeals held the interest "**issue**" was not "inextricably intertwined" with the sex discrimination issue because "it was not necessary to obtain or protect any relief awarded, nor was it necessary to preserve the integrity of the Consent Decree as a whole." App 13a (emphasis added).

Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which were denied by the court of appeals on November 19, 2008. App 41a-42a.

REASONS FOR GRANTING THE PETITION

During the intervening period of almost fifteen years since *Landgraf*, the Court has addressed on numerous occasions the impact of a change in the law on actions that occurred prior to the passage of the new law and, in particular, whether the new law is retroactive and whether the statutory change applies to cases already pending in the court. *E.g.*, *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997) (Amendments to False Claims Act did not apply retroactively); *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Martin v. Hadix*, 527 U.S. 343 (1999); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Austria v. Altmann*, 541 U.S. 677 (2004). As Justice Scalia observed: "It will remain difficult in many cases, to decide whether the

presumption [of nonretroactivity] has been overcome by text and indeed to decide whether a particular application is retroactive." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 858 (1990) (footnote omitted) (Scalia, J. concurring).

This Petition raises important questions as to whether a change in statutory law applies to a specific set of circumstances or to a case pending in the federal courts and what is the "relevant retroactivity event" for determining whether the new law applies. This Court's decisions in *Landgraf* and *Kaiser Aluminum*, 494 U.S. at 839, as interpreted by *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 751, 753, *reh'g denied* (Fed. Cir. 1997), hold that where the event triggering the application of the amended statute occurs after the passage of the amendment, the application of the statute is not "retroactive." Here, the triggering or "relevant retroactivity event" was the assertion of the sovereign immunity defense to the payment of pre-November, 1991, prejudgment interest after the entry of final judgment which occurred two years after the effective date of Section 114(2). The court of appeals misconstrued the distinction between the "retroactive" application of a statute and the "prospective" application of that statute. The lower court's decision cannot be reconciled with this Court's holdings in *Landgraf*, *Kaiser Aluminum*, and *Altmann* which require the "prospective" application of Section 114(2).

The Court should grant review because of the importance of the issue and because of the need to provide additional guidance to courts of appeal as to when the default rule in *Landgraf* does not apply.

Petitioners urge the Court to rule that under *Altmann* the "default rule" in *Landgraf* does not apply to defenses of sovereign immunity, whether asserted by foreign governments under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), or by the United States because the "relevant retroactivity event" was the assertion of the sovereign immunity defense to the payment of pre-November 21, 1991, prejudgment interest after the entry of final judgment which occurred two years after the effective date of Section 114(2). Since the application of Section 114(2) to this case is not "retroactive," the district court possessed the discretion to award pre-November 21, 1991 prejudgment interest for delay in payment of backpay and attorney's fees.

The Court should grant review to the second question because it is important to clarify that under *Hensley*, district courts have discretion to award attorneys' fees for work performed on successive phases of a single cause of action, particularly when excellent results were obtained in the overall claim.

The issue is important because many statutes allow for awards of reasonable attorney's fees to prevailing plaintiffs, and virtually all lower courts look to *Hensley* for instruction in how to make those awards. According to the Westlaw Keycite database, as of January 30, 2009, 9,485 cases cited *Hensley*.

As we show below, all of the circuits squarely addressing the meaning of "claim," as used in *Hensley*, have decided cases concluding that the term "claim" is synonymous with "cause of action." The Court should grant *Certiorari* to correct the D.C. Circuit's error in

treating separate issues within a single cause of action as separate "claims" and to resolve the split in the circuits whether the word "claim," as used in *Hensley*, is correctly defined as "cause of action."

The Court should also grant review to the question of whether "claim" means "cause of action" to provide guidance on the troubling public policy and ethical concerns created by the court of appeals decision here that class counsel representing the prevailing plaintiff class could **not** be compensated for services they were ethically obligated to provide after the entry of the Consent Decree. After *Landsgraf* and the D.C. Circuit's decision in *Brown*, 78 F.3d 645, the *Trout* class counsel were under a clear ethical obligation to litigate the pre-November 21, 1991 interest issue. Class counsel would have breached their duty of diligent representation owed to the class had they failed to litigate the interest issue when the language of *Brown* appeared to allow civil rights litigants whose claims that were pending "on the merits" when the 1991 Act became law to recover pre-November 21, 1991 prejudgment interest. *See* 36a-37a. Both Judge Greene and Judge Friedman read *Brown* to permit interest to the *Trout* class. Once two district court judges ruled in Petitioners' favor, class counsel had an even more compelling obligation to defend the interest award on appeal.[6]

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[6]Other courts would find these services compensable. *See, e.g., Plyler v. Evatt*, 902 F.2d 273, 281 (4th Cir. 1990); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 526 (7th Cir. 1995); *Jaffee v. Redmond*, 142 F.3d 409, 412, 414, 416-418 (7th Cir. 1998).

Allowing the court of appeals decision to stand runs the risk of discouraging counsel from providing diligent post-judgment representation to prevailing parties in class actions and thus defeating the Congressional intent in allowing statutory fees. As Justice Brennan observed in his concurrence in *Hensley*: "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." 461 U.S. at 445.

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS CONTRARY TO *AUSTRIA V. ALTMANN*.

In *Altmann*, the Court analyzed how to determine whether a waiver of sovereign immunity is "retroactive" under FSIA. The Court's decision in *Altmann* holds that the "default rule" against retroactivity announced in *Landgraf*, does not apply to statutory waivers of sovereign immunity under the FSIA. The Court noted that its "approach to retroactivity in this case thus parallels that advocated by Justice Scalia in his concurrence in *Landgraf*" in which Justice Scalia stated that the "relevant retroactivity event" for determining whether the application of a waiver of sovereign immunity is retroactive or retrospective is not determined by the dates of the conduct at issue. *Altmann*, 541 U.S. at 696, n. 17. Thus, the Government of Austria could be held liable in United States courts for past wrongful actions, even though the government of Austria and its

predecessors were absolutely immune to suit in federal court at the time of the wrongful conduct, because the "relevant retroactivity event" was the assertion of the defense of sovereign immunity that occurred after the passage of the FSIA.

In *Landgraf*, the Court focused on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision, *see Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), and the axiom that statutory retroactivity is not favored, see *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). *Landgraf*, 511 U.S. at 261, 264-265.

In *Landgraf*, the Supreme Court observed:

> [a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, *see Republic Nat. Bank of Miami* v. *United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment), or upsets expectations based in prior law.

Id. at 269 (footnote and parallel citation omitted).

The Court instructed:

> Rather, the court must ask whether the new provision attaches new legal consequences to **events completed** before its enactment. The conclusion that a particular rule operates

> 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269-70 (footnote and parallel citation omitted) (emphasis added).

In construing the waiver of sovereign immunity in the FSIA to apply to pre-act conduct, the Court in *Altmann* adopted the approach set forth by Justice Scalia in his concurrence in *Landgraf*:

> **The critical issue, I think, is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates.** Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. **But other statutes have a different purpose and therefore a different relevant retroactivity event.**

Altmann, 541 U.S. at 697, n.17, quoting *Landgraf*, 511 U.S. at 291 (opinion concurring in judgment) (emphasis added).

In *Altmann*, the Court held: "Immunity 'claims'--not actions protected by immunity, but assertions of immunity to suits arising from those actions--are the

relevant conduct regulated by the Act and are 'henceforth' to be decided by the courts." 541 U.S. at 697 (footnote omitted). The Court concluded that Congress intended courts "to resolve *all* such claims 'in conformity with [FSIA principles] regardless of when the underlying conduct occurred," so long as the sovereign immunity defense was asserted after the Act's passage. *Id.* at 697-698 (footnote omitted). The Court stated: "whether an entity qualifies as an 'instrumentality' of a 'foreign state' for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Id.* at 698 (citation omitted).

The Court further stated that [U]nder *Landgraf*, ... it is *appropriate* to ask whether [FSIA] affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)." *Id.*, at 694 (emphasis supplied). The Court relied on *Landgraf* for the proposition that intervening statutes that merely confer or oust jurisdiction are not subject to the presumption against retroactivity. *Id.* at 693.

In his concurring opinion in *Altmann*, Justice Scalia noted the Court's 'consistent practice of giving immediate effect to statutes that alter a court's jurisdiction.' *Id.* at 703, discussing his concurrence in *Landgraf*, 511 U.S. at 292.

> "[T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the

> exercise of judicial power," rather than to regulate primary conduct, so that the relevant time for purposes of retroactivity analysis is not when the underlying conduct occurred, but when judicial power was invoked. *Id.* at 293. Thus, application of a new jurisdictional statute to cases filed after its enactment is not "retroactive" even if the conduct sued upon predates the statute.

Id. citing *Landgraf*, at 292-293.

Justice Scalia stated he noted that "this rule applies even when the *effect* of a jurisdiction-restricting statute in a particular case is to 'deny a litigant a forum for his claim entirely, or [to] leave him with an alternate forum that will deny relief for some collateral reason.'" *Id.*, 541 U.S. at 703 citing *Landgraf*, at 292-293 (emphasis in original). As Justice Scalia further observed: "The logical corollary of this last statement is that a jurisdiction-expanding statute should be applied to subsequent cases even if it sometimes has the effect of *creating* a forum where none existed." 541 U.S. at 703. (emphasis in original). Thus, the waiver of sovereign immunity in the FSIA is not subject to the usual presumption against retroactivity.

The court of appeals below held that *Altmann* was specific to the FSIA and rejected Petitioners' argument that it should analyze the waiver of sovereign immunity in Section 114(2) of the Civil Rights Act in the same manner as waivers of sovereign immunity under FSIA. App 6a-10a. In reaching this conclusion, the court of appeals relied on language in a footnote in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 38 n.6

(2006). App 9a-10a. *Fernandez-Vargas* addressed whether a provision to reinstate removal orders against aliens illegally reentering this country applied to aliens who reentered the United States before the effective date of the liberalizing terms of the Illegal Immigration Reform and Immigrant Responsibility Act. The case had absolutely nothing to do with sovereign immunity of any kind. In *Fernandez-Vargas* footnote 6, the Court rejected the government's argument that a *Landgraf* analysis could be avoided pursuant to *Altmann*, saying that the Court's conclusion in *Altmann* "turned on the peculiarities of the [FSIA]." 548 U.S. at 38 n.6. The court of appeals below found that since "'those peculiarities are absent'" in *Fernandez-Vargas*, they must also be absent here. App 10a.

The lower court erred, however, in holding that held that the *Altmann* "peculiarities" are missing in the *Trout* litigation because there is no logical reason not to use the date of the assertion of a claim of sovereign immunity for determining whether the application of a statute is retroactive or prospective. Just as *Altmann's* reading of the FSIA imposed liability on Austria in litigation when the defendant asserted defense of sovereign immunity after the passage of the FSIA, so also does Section 114(2) impose liability on the federal government for pre-November 21, 1991 prejudgment interest, pursuant to the statute's undisputed waiver of sovereign immunity, when the "relevant retroactivity event," the assertion of sovereign immunity occurred after the passage of the Act.[7]

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[7]The U.S. Court of Appeals for the Sixth Circuit, *Combs v. Commissioner of Social Security*, 459 F.3d 640, 645 (6th Cir. 2006)

In waiving the sovereign immunity of the federal government to the payment of prejudgment interest contained in Section 114(2) of the 1991 Act, Congress surely knew that prejudgment interest to compensate for the "delay in payment" could not be measured prior to the entry of final judgment in November, 1993. The words "take effect upon enactment" found in Section 402(a) of the Act mean that Section 114(2) applies to all judgments entered after the effective date of the Act because judgment is the point at which "expectations with respect to interest liability were fixed." *Kaiser Aluminum*, 494 U.S. at 839. The "same interest" provision of Section 114(2) logically can apply only to cases in which judgment on the merits is entered after enactment, because where there is no judgment, there can be no prejudgment interest.

The Navy did not assert its defense of sovereign immunity to payment of prejudgment interest until the entry of judgment on November 22, 1993. The Navy could not have asserted the defense of sovereign immunity against the payment of prejudgment interest before the entry of judgment on that date because prejudgment interest cannot begin to run against the United States [or against any party] until judgment is entered.

Under the principles articulated in *Austria v. Altmann*, the "relevant retroactivity event" for the purposes of determining whether the waiver of

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(*en banc*), expressly held that the principles articulated in *Altmann* apply outside the "unique context" of FSIA and relied on *Altmann* in interpreting a change in the regulations under the Social Security Act.

sovereign immunity is retroactive depends on the timing of the assertion of the defense of sovereign immunity. Where the United States asserts sovereign immunity after the passage of the Act waiving that sovereign immunity, the application of the waiver of sovereign immunity is not retroactive.

The November 22, 1993 judgment is the final reckoning which determines whether there is liability and defines the only basis upon which interest can be determined due. *Kaiser Aluminum*, 494 U.S. at 839. The underlying unlawful discriminatory conduct cannot be the wrongful conduct at issue here; rather the act the "relevant retroactivity event" for the assertion of the defense of sovereign immunity is the entry of judgment. *See Landgraf*, 511 U.S. at 293 (for jurisdiction cases the "relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.) (Scalia, J. concurring).

The lower court should have followed the Court's analysis in *Altmann* and applied the waiver of sovereign immunity in Section 114(2) of the Act to allow prejudgment interest on the backpay and attorney's fee awards included in the final judgment entered on November 22, 1993, two full years after the effective date of the Act. The waiver of sovereign immunity found in Section 114(2) of the Act applies to waivers of sovereign immunity to the payment of prejudgment interest asserted by the United States after the date of passage of the Act. Since the "relevant retroactivity event" regulated by Section 114(2) of the Act is the assertion of sovereign immunity, the application of Section 114(2) of the Act waiving sovereign immunity of the United States to the November, 1993 judgment

is not impermissibly retroactive. Under the rule of decision announced in *Altmann*, the application of the Civil Rights Act of 1991 to pre-statute actions did not violate the presumption against retroactive legislation where the government first asserts sovereign immunity after the passage of the Act. 541 U.S. at 692-700.

The outcome in *Landgraf* does not argue against looking to *Altmann* as authority for analyzing the "relevant retroactivity event" that determines the application of Section 114(2). The *Landgraf* majority held that "there is no special reason to think that all the diverse provisions of the [Civil Rights Act of 1991] must be treated uniformly for such purposes [of retroactive application]"). 534 U.S. at 280. The *Altmann* Court's adoption of Justice Scalia's analysis of how to determine whether a waiver of sovereign immunity is retroactive is fully consistent with *Landgraf*.

The Navy has no reliance interests at stake. Gender discrimination against federal employees, like the expropriation at issue in *Altmann*, had always been unlawful, at least since the passage of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(a). The Navy can make no claim that the agency relied on the defense of sovereign immunity against paying prejudgment interest in making its unlawful employment decisions and in delaying this litigation for more than two decades.

There is no *bona fide* sovereign immunity issue raised here because where the "relevant retroactivity event" requiring the payment of interest occurred after

the date of enactment, payment of interest does not offend sovereign immunity. *Travenol Laboratories*, 118 F.3d at 753, (the payment of interest by the federal government on pre-act customs duties was a "prospective" application of the law. *See Block v. Neal*, 460 U.S. 289, 298 (1982) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (citations omitted).

Petitioners respectfully contend there is no principled basis in the law for distinguishing between the "relevant retroactivity event" used to determine whether waivers of sovereign immunity by foreign states are retroactive and the "relevant retroactivity event" used to determine whether waiver of sovereign immunity for the federal government is retroactive. *Altmann's* interpretation of *Landsgraf* should be applicable to all waivers of sovereign immunity, regardless of whether it is the sovereign immunity of the United States or of a foreign nation that is at issue, as the Court should look to the date of the assertion for sovereign immunity to determine whether the waiver of sovereign immunity is retroactive.

Under the Supreme Court's holding in *Austria v. Altmann*, the lower court erred in ruling that the waiver of sovereign immunity in Section 114(2) did not apply to judgments entered after the passage of the Act, because this application of Section 114(2) of the 1991 Act is not retroactive under *Altmann*, 541 U.S. at 696-697 ("Immunity 'claims'--not actions protected by immunity, but assertions of immunity to suits arising

from those actions--are the relevant conduct regulated by the [FSIA]").

The Court should grant the Petition to consider whether the *Altmann* rule of decision applies to this case and whether the waiver of sovereign immunity applies to the judgment entered in this case more than two years after the passage of Section 114 of the Act. The Court should grant the petition, apply *Altmann* to analyze the waiver of the Navy's sovereign immunity in Section 114(2), and reverse the lower court's decision.

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS INCONSISTENT WITH *HENSLEY* AND THE DECISIONS OF THE CIRCUITS WHICH HOLD THAT "CLAIM" MEANS "CAUSE OF ACTION."

The Court should grant *Certiorari* because the decision below is contrary to *Hensley* and the decisions from eleven other courts of appeal interpreting the term "claim" as meaning "cause of action." The court of appeals here misread *Hensley* when it ruled that the interest issue was a separate "claim" from the backpay on which the interest was based.

In the instant case, Petitioners sought relief solely for discrimination under Title VII, and they prevailed on their single cause of action when the Consent Decree provided for payment of all of the backpay Petitioners' expert said was due. It is undisputed that the Petitioners were "prevailing parties" in the underlying Title VII litigation. App. 10a.

Relief in the form of prejudgment interest is not a separate cause of action. Prejudgment interest is an integral part of the relief used to make a winning plaintiff whole. *Kansas v. Colorado*, 533 U.S. 1, 10-11 (2001) (a monetary award does "not fully compensate for an injury unless it includes an interest component") (citations omitted); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.") (citations omitted). *City of Milwaukee v. Cement Div. Nat'l Gypsum*, 515 U.S. 189, 195 (1995); *Loeffler v. Frank*, 486 U.S. 549, 557-558 (1988) (complete relief requires payment of interest). The purpose of an award of interest is to compensate the prevailing plaintiff for delay in payment resulting from litigation. *Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 54 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998) (prejudgment interest to be paid as an ordinary part of any award in a civil rights case); *Cf. Trout v. O'Keefe*, 144 F.R.D. at 597 (condemning the Navy's "overzealous litigation strategy" as causing delays which forced the prevailing plaintiffs to wait for more than twenty years for backpay awards arising as early as June, 1970).

In announcing how a statutory attorney's fee award for a "prevailing party" should be computed under federal civil rights statutes, the Court distinguishes between "claims" (or defenses), on the one hand, and "contentions" or "grounds" or "issues," on the other. *See Hensley*, 461 U.S. at 435. This is a distinction of determinative importance in the instant case. As this Court explained:

> In some cases a plaintiff may present in one lawsuit distinctly *different claims* for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants--often an institution and its officers, as in this case--counsel's work on one claim will be unrelated to his work on another claim.... The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Id., at 434-435. (emphasis added).

This Court opined that cases involving unrelated claims "are unlikely to arise with great frequency" in part because "[m]any civil rights cases will present only a *single claim*." *Id.* at 435. (emphasis added). It said even when separate claims are brought, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* The Court said when a plaintiff has obtained excellent results in the litigation, "the fee award should not be reduced simply because the plaintiff failed to prevail on every *contention* raised in the lawsuit." *Id.* (citation omitted) (emphasis added). The *Hensley* Court also said: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain *grounds* is not a sufficient reason for reducing a fee. The result is what matters." *Id.* (footnote omitted) (emphasis added).

This Court distinguished between "issues" and "claims" in a footnote:

> We agree with the District Court's rejection of "a mathematical approach comparing the total number of *issues* in the case with those actually prevailed upon." Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors.

Id. at 435 n.11 (citation omitted) (emphasis added). In short, attorney's fees generally may be awarded to a prevailing plaintiff on a per "claim" basis, unless several claims are so interrelated that they are better evaluated for purposes of attorney time as one large claim. The litigation is not sorted more finely into "issues" or "contentions" or "grounds" for fee-award purposes.

This Court, "recogniz[ing] that there is no certain method of determining when claims are 'related' or 'unrelated,'" 461 U.S. at 436 n.12, held that attorneys' fees should not be awarded for an unsuccessful claim only when that claim is *"distinct in all respects* from [the plaintiff's] successful claims." *Id.* at 440 (emphasis added). *See Texas Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) ("If claims are peripheral to the primary claim or do not share a common nucleus, the court is to treat those claims as if they were raised in separate lawsuits.").

The lower court treated the request for pre-November 21, 1991 prejudgment interest as a separate claim, not as an integral part of the Title VII cause of

action itself.[8] This is contrary to the case law discussed above holding prejudgment interest an integral part of "make-whole" relief.

Instructive is the approach taken by the First Circuit which squarely addressed the meaning of the word "claim" as used in *Hensley* in *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331 (1st Cir. 1997). The *Coutin* court held:

> In the fee-shifting context, a "claim" is an allegation of a legal injury comprised of various elements and equivalent to a cause of action, whereas "damages" are the compensation awarded to the plaintiff who has suffered a legal wrong and who therefore has a valid claim against the defendant.

Id. at 340. The Court ruled that "punitive damages and loss of income (no matter how they are denominated in the complaint) are not failed claims, but are categories of relief." *Id.* (refusing to reduce fees even though plaintiff did not obtain punitive damages or backpay).

Other courts of appeal have reached the same conclusion defining or noting that "claim" means "cause of action" and distinguishing between "cause of action" and categories or types of relief. *Green v. Torres*, 361 F.3d 96, 98 (2nd Cir. 2004); *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 137-138 (3rd Cir. 1984); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1352 (4th Cir. 1991); *Pruett v. Harris County Bail Bond Bd.*, 499

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[8]The panel decided that the standard of review did not matter. App. 13a.

F.3d 403, 418 (5th Cir. 2007); *Imwalle v. Reliance Medical Products, Inc.* 515 F.3d 531, 554 (6th Cir. 2008); *Ustrak v. Fairman*, 851 F.2d 983, 986, 988 (7th Cir. 1988); *Minnesota Supply Co. v. Raymond Corp.*, 472 F.3d 524, 529, 531, 545 (8th Cir. 2006); *McCown v. City of Fontana*, 550 F.3d 918, 921, 923-925 (9th Cir. 2008); *Browder v. City of Moab*, 427 F.3d 717, 718-19, 722 (10th Cir. 2005); *Quintana v.* Jenne, 414 F.3d 1306, 1312 (11th Cir. 2005); *Andrews v. United States*, 122 F.3d 1367, 1375-1376 (11th Cir. 1997).

Had the D.C. Circuit used the same meaning of "claim" as the other eleven circuits used, that court would have reached the conclusion that under *Hensley* the prejudgment interest issue was not a separate "claim." The panel erred in finding the interest request "distinct in all respects" from the backpay relief awarded under Title VII. App. 13a. This is error because the request for further relief on the backpay awarded under Title VII is not a separate "claim" or "cause of action" under *Hensley*. By definition, interest cannot be separate in all respects from the backpay on which the award of interest is based.

Here, there is no cause of action for interest that could be raised in a separate lawsuit because there can be no demand for interest that is separate and independent from the claim seeking backpay. The lower court misapprehended the facts and the law when it treated the prejudgment interest issue as a separate "claim," distinct from the gender discrimination in promotion claim and when it held that the litigation was not necessary to "obtain or protect any relief awarded." App. 13a.

Hensley teaches that the prejudgment interest litigation here cannot be the "distinctly different claims for relief that are based on different facts and legal theories," 461 U.S. at 434, from the rest of the Title VII litigation and which must be "treated as if they had been raised in separate lawsuits." Since the *Trout* class could not have requested interest in a separate lawsuit and could not have been awarded interest in the absence of an award of backpay, their claim for interest is interrelated with the merits of the case.

The Court should grant the Petition for *Certiorari* because the lower court's decision is inconsistent with *Hensley* and because the D.C. Circuit's failure to recognize that "claim" used in *Hensley* is synonymous with "cause of action" creates a split in the circuits that this Court should resolve.

The effect of the ruling by the court of appeals that under *Hensley*, prejudgment interest is a separate and distinct issue from backpay awarded because of discrimination, App 12a-13a, was to require the plaintiff class to demonstrate again that the plaintiff class was a "prevailing party" on the narrow interest issue in order to be entitled to request reasonable attorney's fees for its legal services performed after the Consent Decree was entered. The Court should grant *Certiorari* because the holding below is contrary to *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), which stated:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA--like other fee-shifting statutes--favors

> treating a case as an inclusive whole, rather than as atomized line-items.

496 U.S. at 161-162. The determination that a plaintiff is a prevailing party thus "operates as a one-time threshold for fee eligibility" for the entire action." *Id.* at 160.

Petitioners should be eligible to apply for attorney's fees and costs for services reasonably rendered after they became "prevailing parties" upon entry of the Consent Decree, even if Petitioners do not prevail on their requests for pre-November 21, 1991 prejudgment interest on backpay and attorney's fees. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-60 (1986).

Even though *Delaware Valley* involved a post-judgment request for fees for administrative enforcement of a judicial decree, its reasoning applies equally apply to Petitioners' litigation of the prejudgment interest issue.

> Protection of the full scope of relief afforded by the consent decree was thus crucial to safeguard the interests asserted by Delaware Valley; and enforcement of the decree, whether in the courtroom before a judge, or in front of a regulatory agency with power to modify the substance of the program ordered by the court, involved the type of work which is properly compensable as a cost of litigation under § 304.

Id. at 558.

That there should be only one determination whether Petitioners are a "prevailing party" applies to matters litigated after judgment on the merits, as well as those decided during the trial phase, even if the prevailing party does not prevail on a particular post-judgment issue. *E.g., Jenkins v. State of Missouri*, 127 F.3d 709, 714 (8th Cir. 1997), citing *Jean* and *Delaware Valley*. No subsequent event deprives the *Trout* class of their status as "prevailing parties," although they did not prevail on every issue. *Id.* at 712, 716 (approving the award of fees to the plaintiff class for work performed in unsuccessfully opposing a Petition for *Certiorari*).

Other courts of appeal have properly applied *Jean* and *Delaware Valley* to permit the award of attorney's fees for unsuccessful efforts by taking into account the class's considerable success in the litigation as a whole to support a fee award in unsuccessful post-judgment actions. *E.g., Cody v. Hillard*, 304 F.3d 767, 773 (8th Cir. 2002). According to *Cody*, once the plaintiff class members become "prevailing parties" by securing the underlying court-ordered relief, their success or failure in post-judgment enforcement actions is only one factor to consider in determining whether plaintiffs are entitled to attorney's fees. 304 F.3d at 773-75. This is the correct analysis. Thus, the lower courts here should have considered that the plaintiff class achieved the maximum success because the 1993 Consent Decree awarded Petitioners every dollar in backpay recommended in the report by their expert witness. App. 1-2.

Other courts of appeal have ruled "prevailing" class action plaintiffs are entitled to reasonable

attorney's fees for litigation on issues that arose after entry of decrees, even when the civil rights plaintiffs lost on those particular issues. *Plyler v. Evatt*, 902 F.2d 273, 280-281 (4th Cir.1990) (affirming an award of fees in post-decree proceedings where the issues were "so 'inextricably intermingled with the original claims in the lawsuit,' that severing those proceedings for a separate analysis of 'prevailing party' status was not justified.") (internal quotation and citation omitted); *Johnson v. City of Tulsa, Oklahoma*, 489 F.3d 1089, 1111 (10th Cir. 2007) (plaintiffs' counsel entitled to compensation for reasonable efforts to preserve fruits of the decree); *see also Turner v. Orr*, 785 F.2d 1498 (11th Cir.), *cert. denied*, 478 U.S. 1020 (1986); *Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993) (providing for the award of attorney's fees "for "useful and necessary" post-judgment proceedings); *Duran v. Carruthers*, 885 F.2d 1492, 1495-96 (10th Cir. 1989); *see Mills v. Freeman*, 118 F.3d 727, 733-34 (11th Cir. 1997).

The Court should grant *Certiorari* to bring the District of Columbia Circuit into compliance with *Jean* and *Delaware Valley* and to resolve a split in the circuits created by the court of appeals whose ruling which differs from the approaches taken by other circuits as to the standards for compensating class counsel for services following entry of a consent decree. Granting *Certiorari* will also provide guidance on the troubling public policy and ethical concerns created by the court of appeals decision that class counsel representing the prevailing plaintiff class could not be compensated for services they were ethically obligated to provide after the entry of the Consent Decree in November, 1993.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to answer whether *Altmann* applies to assertions of sovereign immunity by the United States. The Petition should also be granted to resolve the important legal issue of how to identify the "relevant retroactivity event" which determines whether a statute waiving sovereign immunity is "prospective" and to resolve the conflict between the decision below and that of the Federal Circuit in *Travenol* in determining the "relevant retroactivity event."

The Petition should also be granted to resolve the conflict between the court of appeals below and the other eleven circuits whether *Hensley's* use of the term "claim" means "cause of action," and whether the interest component of a judgment can be separate and distinct from a Title VV backpay award when determining eligibility to apply for attorney's fees. The Petition should also be granted because the court of appeals decision is contrary to *Jean* and *Delaware Valley* and the public policies underlying those cases.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-5053

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT AND CLARA A. PERLIGIERO,
APPELLANTS

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,
APPELLEES

March 18, 2008, Argued

September 2, 2008, Decided

Appeal from the United States District Court for the District of Columbia. (No. 73cv00055).

COUNSEL: Bradley G. McDonald argued the cause for appellants. With him on the brief was John F. Karl, Jr..

Daniel F. VanHorn, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were Jeffrey A. Taylor, U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

JUDGES: Before: SENTELLE, Chief Judge, and GINSBURG and BROWN, Circuit Judges. Opinion for the Court filed by Chief Judge SENTELLE.

OPINION

SENTELLE, *Chief Judge:* In the latest saga of this apparently never-ending battle between the parties over liability and damages for violating Title VII of the Civil Rights Act, the district court denied a motion of Appellants Trout, *et al.*, ("the Trout class") seeking pre-November 21, 1991, interest on backpay and attorneys' fees awarded to them for being subject to sex discrimination in employment during the 1970's. The Civil Rights Act of 1991, which included a provision for the award of prejudgment interest, was enacted on November 21 of that year. Although this court previously held that the interest provision did not apply to conduct that preceded enactment of the Civil Rights Act, *Trout v. Secretary of the Navy*, 354 U.S. App. D.C. 384, 317 F.3d 286 (D.C. Cir. 2003) ("*Trout IV*"), the Trout class claims that a subsequent Supreme Court case, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), is an "intervening change in law" that entitles them to interest on backpay and attorneys' fees that accrued before the change in law. The district court also granted Appellee Navy's motion for a refund of interim attorneys' fees and costs paid to the Trout class for litigating the interest issue. Because *Altmann* is inapposite and because the interest issue is distinct from the issue of sex discrimination, we affirm the district court's rulings on the motions.

Background

In 1973 Yvonne Trout and other female employees of the Department of the Navy filed an employment discrimination lawsuit against the Navy, alleging sex

discrimination in violation of Title VII of the Civil Rights Act of 1964 ("the 1964 Act"), 42 U.S.C. § 2000e et seq. After twenty years of litigation the parties entered into a stipulation settling the case on its merits, which was approved by the district court on November 22, 1993 (hereinafter "Consent Decree"). Pursuant to the Consent Decree and other stipulations and orders, the Navy paid the Trout class backpay for the period 1970 to 1992, as well as attorneys' fees up until 1993 for litigating the sex discrimination matter. The doctrine of sovereign immunity shields the government from liability for such payments, except when waived by statute. *See Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1942, 170 L. Ed. 2d 887 (2008). Subsections 2000e-5(g) and 2000e-5(k) of the 1964 Act waive the government's immunity from liability for backpay and attorneys' fees, respectively, for violations of that act. Because the 1964 Act did not allow for the payment of interest on damages, and because any waiver of sovereign immunity must be strictly construed in favor of the government, *see, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986), and further because of the no-interest rule, i.e., "the historical rule that interest is a separate element of damages and may be recovered only against a party that has agreed to be liable therefor," *Brown v. Sec'y of the Army*, 316 U.S. App. D.C. 284, 78 F.3d 645, 651 (D.C. Cir. 1996), under the 1964 Act the Trout class was not entitled to receive interest on the backpay and attorneys' fee awards. On November 21, 1991, however, Congress amended Title VII. Civil Rights Act of 1991 ("the 1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071. Under section 114(2) of that act the government is liable for "the same interest to compensate for delay in payment [as is available] in cases involving nonpublic

parties." 42 U.S.C. § 2000e-16(d). The Navy consequently agreed to pay interest on its liability for backpay and attorneys' fees incurred after November 21, 1991. The Navy argued, however, that section 114(2), 42 U.S.C. § 2000e-16(d), was not retroactive and therefore it was not liable for interest on backpay and attorneys' fee awards for periods prior to November 21, 1991. The Trout class argued otherwise and litigated the issue, culminating in this court's resolution of the matter in *Trout IV*. In the meantime, pursuant to stipulations and orders in 1999 and 2001, the Navy paid the Trout class $106,375.45 in attorneys' fees and expert fees for litigating the pre-November 21, 1991, interest issue.

In *Trout IV* we addressed the question of whether section 114(2), 42 U.S.C. § 2000e-16(d), has retroactive effect. In determining that it did not, we relied on our decision in *Brown*, 316 U.S. App. D.C. 284, 78 F.3d 645, which also concerned the question of whether section 114(2), 42 U.S.C. § 2000e-16(d), applies retroactively. *See Trout IV*, 317 F.3d at 290-92. *Brown* in turn relied on the Supreme Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), in which the Court declined to give retroactive effect to provisions of the 1991 Act that would attach new monetary liability to conduct occurring before the statute's enactment. *See Brown*, 78 F.3d at 648-49. Guided by *Brown* and *Landgraf*, we held that section 114(2), 42 U.S.C. § 2000e-16(d), does not apply to conduct that occurred before November 21, 1991, and therefore the Navy was not liable for interest on backpay and attorneys' fees awarded for conduct before that time. *Trout IV*, 317 F.3d at 292-93. We remanded the case to the district court for a "final

determination of costs and fees owed to the Trout class." *Id.* at 293.

On remand, the Navy filed a motion seeking a refund from the Trout class for $106,375.45, plus interest, that was paid by the Navy to the Trout class for attorneys' fees for litigating the prejudgment interest issue. The Trout class also filed a motion seeking, despite this Court's decision in *Trout IV*, an entry of judgment for pre-November 21, 1991, interest on backpay and attorneys' fees. The Trout class claimed in the motion that the Supreme Court's decision in *Altmann* is an intervening and controlling decision that entitles them to pre-November 21, 1991, interest. The district court granted the Navy's motion and ordered the Trout class to refund the Navy the $106,375.45 plus interest awarded to the Trout class for litigating the interest issue; the court denied the Trout class's motion to award it pre-November 21, 1991, interest in light of *Altmann*. *Trout v. Winter*, 464 F. Supp. 2d 25, 34 (D.D.C. 2006).

Discussion

The Trout class now appeals the district court's rulings on the motions, arguing, *inter alia*, that under *Altmann* it is entitled to pre-November 21, 1991, interest on backpay and attorneys' fees, and that as the "prevailing party" in the sex discrimination litigation it is entitled to attorneys' fees incurred in litigating the interest issue.

Altmann

Despite this Court's holding in *Trout IV* that section

114(2) of the 1991 Act does not apply to conduct that preceded its enactment, the Trout class argues that *Altmann* "constitutes an intervening change in law that requires reversal" of *Trout IV*. *Altmann* concerned a suit filed sometime after 1998 against the state of Austria for conduct that occurred for the most part in 1948. 541 U.S. at 681-84. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 et seq., grants foreign states immunity from suits in the United States subject to certain exemptions. The question for the Court was whether the FSIA, and therefore the exemptions thereunder, applied to claims based on conduct that occurred before the FSIA's enactment. *Altmann*, 541 U.S. at 686-87. As discussed in more detail below, the Court held that the FSIA does apply to pre-enactment conduct. *Id.* at 697. Attempting to analogize its case to *Altmann*, the Trout class argues that *Altmann* now controls statutes that concern waivers of sovereign immunity, and consequently under *Altmann*, section 114(2) of the 1991 Act, 42 U.S.C. § 2000e-16(d), applies to conduct that preceded its enactment. The Trout class therefore claims that it is entitled to interest on backpay and attorneys' fees incurred prior to November 21, 1991. We disagree.

In *Altmann* the plaintiff sued Austria for expropriating, before and after World War II, paintings owned by her family. Austria asserted the defense of sovereign immunity. As noted above, the question addressed by the Court was whether the FSIA applied to conduct that occurred prior to the FSIA's enactment in 1976. *Altmann*, 541 U.S. at 686-87. In answering this question the Court first looked to the default rule of no retroactive effect of congressional enactments announced in *Landgraf*, 511 U.S. at 263, 280. *Altmann*,

541 U.S. at 692-94. The Court noted that under *Landgraf* there is a presumption against retroactivity if Congress has not expressly stated that the statute is to have retroactive effect and the statute affects rights, liabilities, or duties with respect to past conduct. *Id.* at 693-94 (citing *Landgraf*, 511 U.S. at 280). On the other hand, the Court noted that the application of a statute to future as well as pending cases would be sanctioned if the statute merely confers or ousts jurisdiction. *Id.* at 693. The Court noted that although these principles seemed comprehensive, they did not provide a clear answer in the case before it because the FSIA could not be categorized as exclusively affecting either substantive rights or procedural matters. *Id.* at 694. The Court then noted that the purpose of the antiretroactivity presumption is "to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct," and that this had never been the purpose of foreign sovereign immunity. *Id.* at 696. Rather, stated the Court, foreign sovereign immunity aims to protect foreign states "'from the inconvenience of suit as a gesture of comity.'" *Id.* (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003)). The Court consequently looked to the FSIA and the circumstances surrounding its enactment for any suggestion that it should not apply to the 1948 conduct at issue. *Id.* at 697. In holding that the FSIA applies "to all pending cases regardless of when the underlying conduct occurred," the Court relied on "[t]he FSIA's overall structure" as well as "two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims." *Id.* at 698-99. Additionally, the Court looked to Congress's

understanding of the FSIA as noted in its preamble, which provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States . . . with the principles set forth in" the Act. *Id.* at 697 (quoting 28 U.S.C. § 1602) (emphasis omitted). The Court noted that pursuant to this language "[i]mmunity 'claims'-not actions protected by immunity, but assertions of immunity to suits arising from those actions--are the relevant conduct regulated by the Act." *Id.*

The Trout class argues that in applying the FSIA retroactively *Altmann* held that the default rule against retroactivity announced in *Landgraf* "does not apply to statutory waivers of sovereign immunity." In support of this argument the Trout class contends that the Supreme Court in *Altmann* adopted Justice Scalia's concurring opinion in *Landgraf, see id.* at 697-98; the class argues that consequently whether a statutory waiver of sovereign immunity may be applied retroactively should not be determined by the dates of the discriminatory conduct proven during the liability phase, but by the date of the assertion of a waiver of sovereign immunity. In other words, according to the Trout class, the relevant conduct for the purpose of retroactivity analysis in *Altmann* was not the expropriation, which predated the FSIA, but rather Austria's invocation of sovereign immunity at the time of the suit. Quoting from *Altmann* that "assertions of immunity to suits . . . are the relevant conduct regulated by the [FSIA]," 541 U.S. at 697, the Trout class contends that the "same interest" provision of section 114(2), 42 U.S.C. § 2000e-16(d), "logically can apply only to cases in which judgment on the merits is entered after enactment, because where there is no

judgment, there can be no judgment interest, and hence no assertion of a defense of sovereign immunity against the payment of prejudgment interest."

The Trout class concludes that consequently section 114(2), 42 U.S.C. § 2000e-16(d), "applies to all judgments entered after the effective date of the Act," and therefore it is entitled to interest on backpay and attorneys' fees incurred prior to November 21, 1991.

In *Trout IV* we held that section 114(2), 42 U.S.C. § 2000e-16(d), does not apply to conduct that preceded its enactment on November 21, 1991. 317 F.3d at 292. In doing so we relied on *Brown* which in turn relied on *Landgraf* and its default rule against retroactivity. We find nothing in *Altmann* that alters the rule under *Landgraf*. *Altmann* expresses no disagreement with the decision in *Landgraf*. Instead, the Court in *Altmann* stated that the retroactivity inquiry set forth in *Landgraf* "does not provide a clear answer in this case" because "the FSIA defies such categorization." 541 U.S. at 694. Resolution of the question before the Court turned on an analysis of the FSIA itself. In holding that the FSIA applies "to all pending cases regardless of when the underlying conduct occurred," the Court relied specifically on the history of foreign sovereign immunity, Congress's understanding of the FSIA as noted in its preamble, "[t]he FSIA's overall structure" as well as "two of the Act's principal purposes." *Id.* at 696-99. It is clear, then, that the Court's decision in *Altmann* was specific to the statute in that case. The Court itself reinforced this conclusion by stating that its analysis encompassed a "*sui generis* context." 541 U.S. at 696. And in *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006), the

Supreme Court noted that its "conclusion in [*Altmann*], that *Landgraf* was to be avoided, turned on the peculiarities of the Foreign Sovereign Immunities Act." *Id.* at 38 n.6. Just as in *Fernandez-Vargas*, "[t]hose peculiarities are absent here, and we thus advert to *Landgraf*, as we ordinarily do." *Id.* In sum, *Altmann* has no effect upon the holding in *Landgraf* and consequently this Court's decision in *Trout IV* stands.

Distinction of claims

Section 113 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(k), states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs . . . ." There is no dispute that the Trout class was the prevailing party on the primary issue of sex discrimination and that it is entitled to an award of attorneys' fees from the Navy for litigating that issue. The Trout class contends, however, that even if it is determined that it is not eligible for pre-November 21, 1991, interest on backpay and attorneys' fees, the district court nevertheless erred when it ruled that the class was not entitled to recovery of the attorneys' fees incurred for litigating that issue. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the Supreme Court addressed the question of whether a plaintiff who has succeeded on a significant claim, and therefore is entitled to attorneys' fees for work done on that claim, is also entitled to attorneys' fees for work performed on an unsuccessful claim. The Court, "recogniz[ing] that there is no certain method of determining when claims are 'related' or 'unrelated,'" 461 U.S. at 436 n.12, held that attorneys' fees should not be awarded for an

unsuccessful claim when that claim "is *distinct* in all respects from [the plaintiff's] successful claims." *Id.* at 440 (emphasis added). The Navy argues that the interest issue is distinct from the sex discrimination issue and therefore no attorneys' fees should be awarded for litigating that issue.

The Trout class asserts that the issues are in fact not distinct, claiming that, for purposes of collecting attorneys' fees, it remains the "prevailing party" in the sex discrimination litigation, and that its request for pre-November 21, 1991, interest was part of that litigation because such interest was intended to compensate the class for damages due to "the Navy's bad faith delays." For authority the Trout class relies on *Cody v. Hillard*, 304 F.3d 767, 773 (8th Cir. 2002), in which the Eighth Circuit, in determining whether to award attorneys' fees to the plaintiffs for civil rights litigation, considered, *inter alia*, the plaintiffs' "considerable success in the litigation as a whole," and whether issues litigated later were "inextricably intertwined" with the issues upon which the plaintiffs prevailed. *Id.* at 773-74. Here, argues the Trout class, the 1993 Consent Decree gave them "maximum success," and furthermore the interest issue is "'inextricably intertwined' with the awards of backpay and attorneys' fees because the class would have no claim for interest if it were not the "prevailing party" in the underlying sex discrimination litigation. Under this approach, a claim for prejudgment interest would always be deemed related to the merits claim. The Trout class further argues that the Consent Decree contains express language reserving the pre-November 21, 1991, interest issue, and that under a fair reading of the Consent Decree it was required to litigate that

interest issue. Quoting from the Tenth Circuit's decision in *Johnson v. City of Tulsa*, 489 F.3d 1089 (10th Cir. 2007), that attorneys' fees were to be awarded for "compensation for reasonable efforts to preserve the fruits of the decree," *id.* at 1111, the Trout class argues that the Consent Decree expressly contemplated that a post-judgment determination would be made as to whether the class would receive pre-November 21,1991, interest, and that in seeking that interest the class was trying to "preserve the fruits" of the Consent Decree. Therefore the Trout class claims that the interest issue was "part and parcel of the central issue in the case," i.e., the sex discrimination allegations.

The Navy contends that the Trout class's argument that it should be awarded attorneys' fees for litigating a post-decree issue even though it lost that issue on appeal has no merit. According to the Navy, fees for litigating post-decree issues have only been awarded in two situations. The first situation is when the consent decree expressly authorizes the court to award such fees. Here, the Navy argues, the Consent Decree did not obligate it to pay such fees regardless of the final outcome of the issue, but merely reserved the Trout class's right to seek such fees. And the Navy further argues that any such fees already paid were subject to explicit reservations of the right of the Navy to seek recovery of those fees if it prevailed on the interest issue. The second situation in which fees have been awarded for litigating post-decree issues, according to the Navy, is when that litigation was necessary to protect the relief granted for the primary claims. But the litigation issue here, argues the Navy, was not necessary to secure any particular relief granted by the

Consent Decree. Instead, the Navy contends, the litigation on the interest issue was undertaken in an attempt to gain an additional remedy for the Trout class. Consequently, contends the Navy, the district court acted well within its discretion when it determined that the interest issue was distinct from the sex discrimination issue.

Relying on the factors set forth in *Hensley*, the district court determined that the Trout class's unsuccessful interest claim was distinct from its successful sex discrimination claim, *Trout*, 464 F. Supp. 2d at 32, and we agree. The Trout class and the Navy disagree as to our standard of review on the issue of the distinctness of the sex discrimination claim and the interest claim. The Trout class contends that this is a purely legal question which we should review *de novo*, while the Navy believes that we should review the district judge's decision for abuse of discretion, giving great deference to the district judge's superior knowledge of the case as a whole. On the present record we need not establish a precedent on that subject as the same result prevails in any event. Even applying the *de novo* standard, we agree with the Navy that the claims are distinct. Litigation of the interest issue was not inextricably intertwined with the sex discrimination litigation -- it was not necessary to obtain or protect any relief awarded, nor was it necessary to preserve the integrity of the Consent Decree as a whole. The district court therefore correctly determined that the issues were distinct and denied an award of attorneys' fees for litigation of the interest issue.

Remaining issues

In its opinion the district court ruled "that in order to restore the parties to the status quo," 464 F. Supp. 2d at 34, the Navy was entitled to interest on the refunded $106,375.45. The Trout class argues that the district court erred by not considering the "tax impact" of its refund order on the class's counsel. As the Navy points out, however, this argument was not raised during the proceedings before the district court, and we therefore deem it waived. We find no merit in the Trout class's other claims made in this appeal.

Conclusion

For the reasons stated above, we affirm the judgment of the district court.

Civil Action No. 73-0055 (PLF)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, et al.,
Plaintiffs,

v.

DONALD C. WINTER, [1] Secretary of the Navy, et al.,
Defendants.

COUNSEL: For YVONNE G. TROUT, Individually and on behalf of others similarly situated, CLARA A. PERLIGIERO, Plaintiffs: Bradley G. McDonald, LEAD ATTORNEY, MCDONALD & KARL, Washington, DC; John F. Karl, KARL & TARONE, Washington, DC.

For SECRETARY OF NAVY, COMMANDING OFFICER NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY, Defendants: Daniel Franklin Van Horn, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC; Darya Geetter, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington DC; Scott Sutherland Harris, LEAD ATTORNEY, U.S. SUPREME COURT, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINION BY: PAUL L. FRIEDMAN

OPINION

The relevant facts and procedural history of this lengthy class action Title VII lawsuit have been set forth in many previous opinions, most recently by the United States Court of Appeals for the District of Columbia Circuit in *Trout v. Sec'y of the Navy*, 354 U.S. App. D.C. 384, 317 F.3d 286, 288-89 (D.C. Cir.), *cert. denied*, 540 U.S. 981, 124 S. Ct. 463, 157 L. Ed. 2d 371 (2003). To summarize briefly, the issue now before the Court for resolution is whether plaintiffs are entitled to prejudgment interest under Section 114(2) of the Civil Rights Act of 1991 on their award of backpay and attorneys' fees for periods prior to the effective date of the Act. See 42 U.S.C. § 2000e-16(d). On July 17, 2001, this Court entered a Final Judgment [666] awarding the plaintiffs $8,627,276.40 in interest on the backpay previously awarded, and $1,477,020.90 in interest on attorneys' fees. The defendants appealed.

On January 31, 2003, the court of appeals reversed, holding that the defendants could not be ordered to pay prejudgment interest on backpay and attorneys' fees for periods prior to November 21, 1991, when Section 114(2) of the Civil Rights Act became effective. See *Trout v. Sec'y of the Navy*, 317 F.3d at 287-88, 290-91. Furthermore, because defendants had paid interim attorneys' fees to counsel for plaintiffs that was attributable to litigation of the prejudgment interest issue -- the issue on which plaintiffs ultimately lost in the court of appeals -- the appellate court remanded to this Court for a "final determination of the costs and fees owed to the Trout class." See *id.* at 293. After remand, the defendants filed a Motion [673] for Final Determination of Attorneys' Fees and Costs Owed

to the Plaintiff Class ("Mot. for Final Deter.") and plaintiffs filed a Motion [687] for Entry of Declaratory Judgment Awarding Plaintiffs' Pre-November, 1991 Interest on Backpay and Attorney's Fees Pursuant to *Austria v. Altman* [*sic*] ("Pl.'s Altmann Mot."), both of which are now before the Court.

I. BACKGROUND

Originally begun in 1973 as a Title VII class action employment discrimination lawsuit, the Trout litigation has now continued for over thirty years. In 1981, after a lengthy trial involving forty-two witnesses, 7,000 pages of exhibits, and extensive regression analysis demonstrating sex discrimination in the Navy's hiring, promotion, evaluation and assignment of women, Judge Harold H. Greene, the presiding judge, found that the Navy had violated Title VII and ordered the award of backpay. See *Trout v. Hidalgo*, 517 F. Supp. 873 (D.D.C. 1981); Trout v. Hidalgo, Civil No. 73-0055, 1981 WL 416 (D.D.C. Oct. 20, 1981). See also *Trout v. Lehman*, 652 F. Supp. 144 ((D.D.C. 1986). As recounted by the court of appeals, numerous additional decisions and stipulations followed, awarding additional backpay. See *Trout v. Sec'y of the Navy*, 317 F.3d at 288. On September 20, 1993, the parties entered into a stipulation settling the case on its merits [553]; Judge Greene approved the stipulation on November 22, 1993 [569]. Because, as even defendants agree, plaintiffs were the prevailing parties in the Title VII case, Judge Greene properly also awarded attorneys' fees and costs to plaintiffs. *Id.*

While the case was pending on its merits, the Civil Rights Act of 1991 was enacted. It provided in Section

114(2) for the award of prejudgment interest: the federal government is liable for "the same interest to compensate for delay in payment [as is available] in cases against nonpublic parties." 42 U.S.C. § 2000e-16(d). By stipulations of May 10, 1995 [596, 597], defendants agreed to pay prejudgment interest on the backpay and attorneys' fees awards, the interest to begin running from November 21, 1991, the effective date of the Civil Rights Act of 1991. Plaintiffs preserved their right to seek interest for periods before that date. See Stipulation [596] at 4; Stipulation [597] at 2-3.

The issue presented first to Judge Greene and then to the court of appeals was whether Section 114(2), which became effective on November 21, 1991, could be applied where the discriminatory conduct had terminated before the effective date of the law. Judge Greene, who handled the case for most of its lengthy history, concluded that even though the liability phase of this case had ended on April 25, 1990, the application of Section 114(2) was appropriate given the government's efforts "to delay the litigation and to drive up its costs." See *Trout v. O'Keefe*, 144 F.R.D. 587, 590 (D.D.C. 1992). On July 22, 1998 and August 12, 1998, respectively, Judge Greene issued a Memorandum Opinion and Orders awarding plaintiffs prejudgment interest on attorneys' fees [621] and on backpay awards [622]. Prior to the entry of Final Judgment, however, Judge Greene passed away. The case was randomly reassigned to the undersigned and, on July 17, 2001, this Court entered Final Judgment [666] and ordered the defendants to pay interest on the backpay awards and attorneys' fees.

This Court's July 17, 2001 Final Judgment with respect to prejudgment interest was based on two stipulations that had been approved by Judge Greene and an Order issued by the undersigned:

1. By stipulation and order of March 3, 1999 [644], Judge Greene ordered the payment of $8715.00 to compensate plaintiffs for the expert services of John Chagnon.

2. By stipulation and order of May 5, 1999 [646], Judge Greene ordered the payment of $76,097.45 to plaintiffs' attorneys for work performed between June 5, 1997 and January 20, 1999 litigating the pre-November 21, 1991 interest issue.

3. By order of May 31, 2001, the undersigned ordered defendants to pay attorneys' fees to plaintiffs in the amount of $21,563 for work done by plaintiffs' counsel between January 30, 1999 and April 30, 2000 litigating the pre-November 21, 1991 interest issue.

In the March 3, 1999 and May 5, 1999 stipulations, defendants expressly reserved their right to seek recovery of the amounts agreed to and paid should they "ultimately obtain a judgment that they do not owe pre-November 21, 1991 interest on backpay and/or attorneys' fees." See Stipulation [644] at 2; Stipulation [646] at 1-2. Defendants' partial opposition to and partial concurrence in the motion leading to the May 31, 2001 Order contained a similar reservation. The total amount of attorneys' fees, expert fees and costs covered by the two stipulations and the Order described above is $106,375.45.

The defendants appealed the July 17, 2001 Final Judgment. On January 31, 2003, the court of appeals reversed on the issue of pre-November 21, 1991 interest, holding that Section 114(2) of the Civil Rights Act did not apply to a period before its effective date. The court of appeals remanded the case to this Court for a "final determination of the fees and costs owed to the Trout class." *Trout v. Sec'y of the Navy*, 317 F.3d at 292-93.

In its opinion, the court of appeals emphasized two points. First, any statute waiving the sovereign immunity of the United States is subject to the rule of strict construction. See *Trout v. Sec'y of the Navy*, 317 F.3d at 289-90 (citing *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986) and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983)). Any doubts about the scope of waiver are to be "resolved in favor of the narrower, governmental liability." *Id.* (quoting *Nichols v. Pierce*, 239 U.S. App. D.C. 146, 740 F.2d 1249, 1257 (D.C. Cir. 1984). Because there is no express language in Section 114 or in the legislative history of the Civil Rights Act of 1991 suggesting that Congress intended retroactively to waive immunity as to the government's liability for interest payments, the court explained that "to apply § 114(2) retroactively would be to impose liability on the government without its explicit, required consent." *Trout v. Sec'y of the Navy*, 317 F.3d at 290 (citing *Brown v. Sec'y of the Army*, 316 U.S. App. D.C. 284, 78 F.3d 645, 654 (D.C. Cir. 1996)).

Second, the court of appeals reasoned that the ongoing nature of the litigation at the time of the enactment of Section 114(2) and the fact that final judgment on

remedy was not entered until after the statute's effective date were insufficient justifications for applying that provision to this case. The court emphasized that the relevant issue was not the procedural posture of the case and its ongoing nature, but rather whether the discriminatory *conduct* was ongoing at the time of the provision's passage. See *Trout v. Sec'y of the Navy*, 317 F.3d at 291. Since the Title VII violations at issue had ended in 1979, over a decade before the enactment of Section 114(2), and the liability phase of the case was concluded by April 25, 1990, there was no basis for the award of pre-November 21, 1991 interest. See *id.* at 292. For these reasons, the court of appeals held that this Court had erred in awarding prejudgment interest on backpay and attorneys' fees for periods prior to November 21, 1991. See *id.* at 293. Since the Navy already had paid some interim attorneys' fees and costs to the plaintiffs, the court of appeals remanded the case for the proper determination of the fees and costs owed to the Trout class. See *id.* Plaintiffs filed a petition for rehearing and a suggestion of rehearing en banc, which were denied by the court of appeals on March 28, 2003. Plaintiffs also filed a petition for a writ of certiorari with the United States Supreme Court which was denied on November 10, 2003.

After this case was remanded, defendants filed their motion for a final determination of attorneys' fees and costs owed, seeking a refund of $106,375.45, plus interest. See Mot. for Final Deter. at 1. On December 22, 2003, plaintiffs filed an opposition. On December 17, 2003, plaintiffs also filed a separate motion to dismiss with prejudice defendants' claim for recoupment of $106,375 [676]. That motion was

administratively closed, but the arguments therein have been treated as further opposition to the motion for a final determination. See Order of September 30, 2004 [684].

In the interim, the Supreme Court issued a decision in *Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), which plaintiffs contend was an intervening and controlling decision. Plaintiffs filed with the Supreme Court a petition for rehearing of the denial of their petition for a writ of certiorari. See October 5, 2004 Notice [685]. That petition was denied on November 1, 2004. See November 5, 2004 Notice [686]. Plaintiffs then filed a motion [687] with this Court for entry of judgment awarding plaintiffs pre-November, 1991 interest on backpay and attorneys' fees pursuant to *Austria v. Altmann*, which also is before the Court.

II. ATTORNEYS' FEES AND COSTS

The funds the defendants seek to recover include the interim attorneys' fees and costs paid to the plaintiffs after 1997 that relate exclusively to the time spent and costs incurred in connection with litigating the issue of the right to prejudgment interest for the period prior to the enactment of the Civil Rights Act of 1991, plus interest thereon. The relevant question here is whether the plaintiffs are entitled to attorneys' fees and costs as the "prevailing party" for that time period because of their success in the underlying Title VII litigation or, as defendants argue, whether the plaintiffs' failure with respect to the prejudgment interest dispute precludes "prevailing party" status *as to that claim* and therefore precludes the award of fees and costs regarding that

claim.

Under the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), a party's entitlement to attorneys' fees must be premised on successful litigation of a claim. "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Hensley v. Eckerhart*, 461 U.S. at 434-35. In light of Hensley, our court of appeals has noted that a plaintiff "may recover fees only for work related to the claim on which he prevailed." *Wil iams v. First Government Mortgage & Investors Corp.*, 343 U.S. App. D.C. 222, 225 F.3d 738, 746 (D.C. Cir. 2000) (citing *Hensley v. Eckerhart*, 461 U.S. at 434); see also *Anthony v. Sullivan*, 299 U.S. App. D.C. 198, 982 F.2d 586, 589 (D.C. Cir. 1993) ("[W]hen a party has obtained no favorable results in a particular aspect of a litigation, that party may receive no fee for work on that part of the case.").

The defendants argue that the prejudgment interest claim that plaintiffs unsuccessfully litigated was discrete from their successful litigation of the Title VII claim and that plaintiffs therefore are not entitled to attorneys' fees and costs on that issue. See Memorandum of Points and Authorities in Support of Mot. Final Deter. at 10-11. The defendants note that the Final Order regarding backpay was signed on

November 22, 1993 and that the prejudgment interest claim continued to be litigated for years after the Title VII litigation had terminated. See *id.* at 7. The defendants also note that the parties stipulated on July 9, 1997 that the "only remaining issue before the Court is the award of interest on attorneys' fees and costs." *Id.* at 3. Defendants argue that the prejudgment interest litigation therefore is a separate claim, distinguishable from the earlier litigation. See *id.* at 8-10. Since plaintiffs ultimately were unsuccessful on that claim, defendants contend that plaintiffs are not entitled to attorneys' fees and costs as a "prevailing party" on that claim. See *id.* at 9.

A. Judgment Fund

While the plaintiffs do not dispute their ultimate lack of success on the prejudgment interest issue, they make several arguments as to why the defendants' motion nevertheless should be denied. Plaintiffs' primary argument is that a refund is precluded because the payments were financed by the government's judgment fund. See Plaintiffs' Opposition to Defendants' Motion for Final Determination ("Opp.") at 2. Under 31 U.S.C. § 1304, Congress created the "judgment fund" statute to allocate "[n]ecessary amounts" to be "appropriated to pay *final judgments*, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law." 31 U.S.C. § 1304(a) (emphasis added). Under the statute, payment is only provided when a judgment is final under 28 U.S. C. § 2414. [2] Plaintiffs argue that the explicit language of 28 U.S.C. § 2414 regarding "final judgments" indicates that any payment made through the judgment fund is precluded from further appeals. See Opp. at 2.

Alternatively, plaintiffs maintain that even if the payments are subject to appeal, the defendants should have appealed at the time of each of the interim payments rather than at the conclusion of the litigation because each payment -- made, as it was, from the judgment fund -- necessarily was final. See *id.*

Ironically, this line of argument was last discussed by the court of appeals in *Trout v. Garrett*, 282 U.S. App. D.C. 33, 891 F.2d 332 (D.C. Cir. 1989), an appeal from an earlier decision by Judge Greene in this very case. At that point in the litigation, it was the government that argued that it was unable to make interim payments through the judgment fund because the express language of the fund only allowed for payment of "final" judgments. The court of appeals disagreed, noting that under 42 U.S.C. § 2000e-5(k) Congress expressly waived the immunity of the United States from claims, whether final or interim, for attorneys' fees and costs. See *id.* at 333. The court of appeals reasoned that if Congress expressly allowed a claim for interim fees against the government by a Title VII plaintiff, then it must also have intended that there be some means by which to pay the interim fees and costs. See *id.* at 334. The court explained that "to acknowledge an interim fee as *awardable* against the government but not *payable* prior to a [final] judgment . . . 'makes nonsense of the concept of an *interim* award.'" *Id.* (quoting *Rosenfeld v. U.S.*, 859 F.2d 717, 727 (9th Cir. 1988)) (emphasis in originals). The court continued: "We find no tenable support for the notion that Congress designed the judgment fund measure to retract or limit duly enacted waivers of sovereign immunity, and we do not doubt the government's ability to arrange for payment of its lawfully-declared debts." *Id.* at 335. The

court went on to state that once it is understood that sovereign immunity does not preclude the payment of "interim" fee awards, it was apparent that the district court's order was not immediately reviewable. *Id.* The court also noted that "[i]nterlocutory is indeed the word descriptive of the district court's fee award. The award does not even dispositively determine fees . . ." *Id.* Interim payments, because they were neither final nor dispositive, could not be immediately appealed. *Id.* at 333.

While the Trout class may now want to suggest that each of the payments through the "judgment fund" was final and that the time to appeal each has passed, the court of appeals' decision in *Trout v. Garrett* rejected this line of reasoning. See *Trout v. Garrett*, 891 F.2d at 335. The D.C. Circuit dismissed the appeal, expressly requiring that the government wait to appeal until after a final decision was rendered; nothing about the means of payment through the judgment fund prevents a later appeal. *Id.* Finally, as defendants note, in this case stipulations were entered into by the parties at the time of two of the three interim payments that defendants retained the "right to seek recovery" in the event that they ultimately obtained a decision that they did not owe pre-November 21, 1991 interest. *See* Memorandum of Points and Authorities in Support of Mot. for Final Deter. at 5. As a result, neither payment through the "judgment fund" nor the government's failure to immediately appeal therefrom precludes the instant request for a refund.

B. Relatedness of Claims

The next question before the Court is whether the

plaintiffs' previous successful litigation of the Title VII claim is sufficiently related to the unsuccessful prejudgment interest dispute that attorneys' fees and costs should be granted for litigation of the latter. In *Hensley v. Eckerhart*, the Supreme Court acknowledged that "there is no certain method of determining when claims are related or unrelated." *Hensley v. Eckerhart*, 461 U.S. at 437 n. 12 (internal quotations and citations omitted). The Court also emphasized that it was within the district court's discretion to consider factors, like "the extent of a plaintiff's success" and "the scope of the litigation as a whole" in making the relatedness determination. *Id.* at 438-39. While the district court clearly has such discretion in calculating an appropriate fee, our court of appeals has held that under *Hensley* "when a party has received no favorable results in a particular aspect of a litigation, that party may receive no fee for work on the part of the case." *Anthony v. Sullivan*, 982 F.2d at 589. " *[N]o* fee may be granted for work done on claims on which the party did not prevail, unless the unsuccessful claims were submitted as alternative grounds for a successful outcome that the plaintiff did actually achieve." *Id.* (emphasis in original). See also *Williams v. First Government Mortgage & Investors Corp.*, 225 F.3d. at 746 (holding that party may recover fees only for work related to the claim on which he prevailed).

Applying the principles enunciated by the courts in *Hensley, Anthony* and *Williams*, this Court concludes that plaintiffs' unsuccessful claim for pre-November 21, 1991 prejudgment interest was distinct from their successful Title VII litigation. The court of appeals rejected plaintiffs' claim for such interest and reversed Judge Greene's decision awarding such interest

payments. Thus, plaintiffs did not prevail on this discrete claim, which was neither an alternative ground for a successful outcome nor integral to the larger Title VII litigation. Attorneys' fees and costs therefore may not be awarded to plaintiffs with respect to that claim.

C. Scope of Remand

Plaintiffs' only remaining argument against the refund concerns the precise scope of the remand from the court of appeals. Plaintiffs argue that the court of appeals remanded for a "final determination of the costs and fees owed *to the Trout class* " and not for the purpose of determining the costs and fees owed *to the Navy. See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Dismiss with Prejudice Defendants' Claim for Recoupment [676] at 2 (emphasis added). The Court disagrees. The Court is not awarding the Navy *its* costs and fees, of course -- the Court is issuing a final determination of the costs and fees actually owed to the Trout class. Following the decision of the court of appeals, the Court concludes that the Trout class is not owed certain of the specific costs and fees which defendants already paid on an interim basis. Plaintiffs therefore must return those interim payments to defendants.

III. EXPERT FEES

Plaintiffs' expert, John Chagnon, is a certified public accountant hired by plaintiffs for the sole purpose of determining the proper amount of pre-November 21, 1991 interest owed to the Trout class under Judge Greene's orders. Congress included expert costs as a part of an award of a prevailing party's attorneys' fees.

See 42 U.S.C. § 1988(c). [3] Because expert costs are awarded as a part of attorneys' fees, it follows that a refund of related expert fees awarded will accompany a refund of any attorneys' fees awarded. By stipulation and order of March 3, 1999 [644], defendants agreed to pay for Mr. Chagnon's services in the amount of $8715, but they reserved their right to seek the recovery of this amount if it were ultimately determined that they did not owe pre-November 21, 1991 interest on backpay or attorneys' fees -- the amount that Mr. Chagnon was hired to calculate. See March 3, 1999 Stipulation [644] at 2. Since Mr. Chagnon was hired and used for the exclusive purpose of helping plaintiffs pursue this unsuccessful claim, see Reply [678] at 14, the payments for his services therefore must be included in the refund.

IV. THE IMPACT OF AUSTRIA V. ALTMANN

Following the court of appeals' reversal and remand, the Supreme Court decided *Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). Plaintiffs argue that the decision in Altmann was an "intervening and controlling decision" that should render the court of appeals' decision in this case moot. See Pl.'s *Altmann* Mot. at 4, 7, 12. According to plaintiffs, the decision in *Altmann* alters the "default rule" against retroactivity announced in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). They argue that *Landgraf* "does not apply to statutory waivers of sovereign immunity." Pl.'s *Altmann* Mot. at 7. Defendants respond that this Court has no power to (1) expand the scope of the remand from the court of appeals, (2) disregard the Supreme Court's denial of *certiorari* to hear the *Trout*

case, or (3) effectively reverse the court of appeals' judgment in this case. *See* Defendants' Opposition to Plaintiff's Motion for Entry of Judgment at 2. Further, defendants emphasize that nothing in the *Altmann* decision affects the remand because *Landgraf* is still the law and the court of appeals properly applied it in this case. See *id.* at 5.

The Court agrees with defendants' final argument and concludes that the decision in *Altmann* does not affect the present remand. The decision in *Austria v. Altmann* did not alter the rule set forth in *Landgraf* that absent a clear congressional intent to the contrary, statutes do not operate retroactively. See *Landgraf v. USI Film Products*, 511 U.S. at 280. On the contrary, the Supreme Court in *Altmann* stated that the decision in *Landgraf* did "not provide a clear answer *in this case*." *Austria v. Altmann*, 541 U.S. at 694 (emphasis added). In significant part, the Supreme Court's decision in *Altmann* hinged on the substantial differences between statutes such as Title VII, which *Landgraf* involved, and the sovereign immunity of foreign states, the issue involved in *Altmann*. *See id.* at 696. In examining the language in the preamble to the Foreign Sovereign Immunities Act ("FSIA"), the Supreme Court discussed the ambiguity surrounding whether the statute might be intended to be retroactive. The Court emphasized the words of the preamble: " *[c]laims* of foreign states to immunity should *henceforth* be decided by courts . . ." *Austria v. Altmann*, 541 U.S. at 697 (quoting 28 U.S.C. § 1602). Throughout its opinion, the Supreme Court reiterated that its holding was a narrow one, applicable specifically to the FSIA. See 541 U.S. at 700. As a result of the narrowness of the holding in *Altmann* and

the significant distinctions between the facts of *Altmann* and those of the present case -- also, like *Landgraf*, a Title VII case involving the 1991 amendments to the Civil Rights Act -- it is evident that the decision in *Altmann* is not an intervening change in controlling law that affects the court of appeals' reversal and remand in this case.

V. INTEREST ISSUE

One final issue remains: whether the refund to the Navy should include interest, and if such interest is granted, at what rate. Defendants note that the Trout class and its counsel have had the use of the attorneys' fees and expert costs for many years. See Memorandum of Points and Authorities in Support of Mot. for Final Deter. at 13. Defendants argue that in order to restore the parties to the status quo, the government is entitled to interest on the refund. *Id.* The Court agrees.

This Court's initial Memorandum Opinion and Order granting prejudgment interest to the Trout class ordered defendants to pay interest at the prime rate rather than at the more favorable Treasury Bill rate, as defendants had urged. See Memorandum Opinion and Order issued May 31, 2001 [659]. While the fairest result now would be to require plaintiffs in making their refund to defendants to pay interest at the same prime rate they received, the government continues to believe that the Treasury Bill rate is more appropriate for such calculations and consistent with precedents involving prejudgment interest calculations in other contexts. See Memorandum of Points and Authorities in Support of Mot. for Final Deter. at 13-14. It therefore proposes that the rates and procedures specified in 28

U.S.C. § 1961 be adopted to calculate interest with respect to the excess interim payments, even though this approach provides a financial windfall to the plaintiffs. The Court adopts defendants' suggestion.

A separate Order consistent with this Opinion will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: December 15, 2006

ORDER

For the reasons set forth in the Opinion issued this same day, it is hereby

ORDERED that Defendants' Motion [673] for Final Determination of Attorneys' Fees and Costs Owed to the Plaintiff Class is GRANTED; it is

FURTHER ORDERED that Plaintiffs' Motion [687] for Entry of Judgment Awarding Plaintiffs' Pre-November, 1991 Interest on Backpay and Attorneys' Fees Pursuant to *Austria v. Altman* [*sic*] is DENIED; it is

FURTHER ORDERED that plaintiffs and their counsel shall refund $106,375.45 of the interim attorneys' fees and costs previously paid by the government in this action plus interest on that amount,

computed using the Treasury bill rate of interest pursuant to 28 U.S.C. § 1961, from the dates on which the excess payments were made up to the date of repayment; and it is

FURTHER ORDERED that the total amount due pursuant to the foregoing paragraph shall be paid to the government by plaintiffs and their counsel within thirty (30) days from the date of this Order. This is a final appealable order. See FED. R. APP. P. 4(a).

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: December 15, 2006

Footnotes

1 Under Rule 25(d)(1) of the Federal Rules of Civil Procedure, Secretary Donald C. Winter has been substituted for former Secretary John H. Dalton.

2 28 U.S.C. § 2414 provides, in part, that "payment of *final judgments* rendered by a district court . . . against the United States shall be made on settlements by the Secretary of the Treasury," and that "[w]henever the Attorney General determines that no appeal shall be taken from a judgment or that *no further review will be sought* from a decision affirming the same, he shall so certify and the judgment shall be deemed final." (emphasis added).

3 42 U.S.C. § 1988(c) provides: "In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

Filed: 7/22/1998
Civil Action No. 73-55 (consolidated with 76-1206) (HH)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, CLARA PERLINGIERO et al,
Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,
Defendants.

Memorandum and Order

This matter is before the Court on cross-motions for summary judgment on the issue of prejudgment interest on attorney fees. Resolution of these motions will mark the completion of one of the longest-running cases in this Court's memory. For the reasons That follow, plaintiffs' motion is granted.

I

On November 22, 1993, this Court approved a stipulation of settlement in this protracted Title VII litigation. It took twenty years to reach the point of settlement because the defendant insisted on opposing, appealing, and moving to re-open already-litigated and already-decided issues at every turn. See e.g. *Trout v. Lehman*, 702 F. 2d 1094, 1106 (D. C. Cir. 1983); *Trout v. O'Keefe*, 144 F.R.D. 587, 588-90 (D.D.C. 1992); *Trout v. Garrett*, 780 F. Supp. 1396, 1420-29 (D.D.C. 1991) ("[T]he government has sought to prolong this litigation

by every means possible, both fair and foul.")

On May 10, 1995, this Court stayed resolution of the final issue in this case, availability of prejudgment interest against the defendants, pending our Court of Appeals' decision in *Brown v. Secretary of the Army*. See 78 F. 3d 645 (D.C. Cir. 1996). *Brown* has since been decided and, almost twenty five years after this case began, this final issue is now ripe for decision.

II.

Brown addressed whether Section 114(2) of the Civil Rights Act of 1991, which took effect on November 21, 1991, could be applied retroactively to cases pending when the section took effect. *See* 78 F. 3d at 648. Section 114(2) waives the sovereign immunity of the United States for interest payments on amounts awarded in Title VII litigation.[1] *Brown*, decided on March 12, 1996, held that section 114(2) is not retroactive and that sovereign immunity barred application of the new interest provision. *See* 78 F.3d. at 647, 651.

III

The parties dispute whether *Brown* applies to this case. The plaintiffs contend that *Brown* applies only to cases like *Brown*, those in which the merits of the case were litigated and completed prior to November 1, 1991. The defendant argues that *Brown* applies to any case pending on the date of enactmtent.

Limited to its facts, the rule of *Brown* applies only to cases in which the merits of the.underlying action were

completed prior to November 21, 1991. Because the instant case was very much alive and being actively litigated on that date,[2] *Brown* is not dispositive and the plaintiffs are entitled to prejudgment interest on attorney fees.

A.

As of November 21, 1991, the effective date of the Act, the award phase of this case was being actively litigated. The following examples are representative of the tenor of this litigation after Sec. 114(2) took effect.

Long after this Court concluded that the Nary had discriminated against the class on the basis of sex, on April 24, 1990 Navy counsel represented to the Court that it retroactively would promote five claimants. *See Trout*, 144 F.R.D. at 591. Then, on September 20, 1990 the Navy filed a pleading entitled "Statement Regarding the Status of Backpay Claims for [the Five Claimants]" in which the department made a "fundamental change in position."*See Trout*, 144 F.R.D, at 591-93. In that filing Navy counsel stated, contrary to the previous representations, that the promotions had not taken place and that the Navy would not promote the five women until it had fully exhausted its claimed right to appeal the question of liability for discrimination of the entire class. *See id.* at 591-92. This matter was not resolved fully until November 23, 1993, the date this Court entered the final order approving the parties' "Joint Stipulation of Settlement.

Additionally, as of November 12, 1992, almost one year after Sec. 114(2) took effect, this Court was still refereeing disputes over the backpay period and

backpay amounts due to the claimants. These backpay issues also were not resolved until November 23, 1993.

As evidenced by the foregoing, although the Court had made a final determination of liability, the award phase was ongoing and the case still far from over when § 114(2) became effective on November 21, 1991.

IV

In addition to the above, the Court notes the purpose of prejudgment interest: to compensate a party for the delay in receiving payment. *See Library of Congress v. Shaw*, 478 U.S. 310 (1986). This case is the classic paradigm where prejudgment interest is appropriate; a Jarndyceian case[3] that has taken on a life of its own and, more importantly, been a constant presence in the lives of the plaintiffs and on the docket of this Court. Foremost in the Court's memory are the epic delays that prevented the efficient closure of an unfortunate chapter in the Navy's history. With this Order, that chapter hopefully shall close and the women who suffered discrimination by the Navy can finally put behind them this lengthy journey:

V.

Based on the lengthy delay endured by the plaintiffs in this case, the Court concludes that they are entitled to pre judgment interest. Additionally, as discussed above, § 114(2) applies to this case and the government is thus liable for the prejudgment interest awarded today.

Accordingly, it is this 22nd day of July 1998 hereby

ORDERED that plaintiffs' motion for prejudgment interest on attorney fees is GRANTED; and it is further

ORDERED that within sixty (60) days of the date of this order the plaintiffs shall submit to the Court a calculation of the interest amount due using the prime rate.

Harold H. Greene
U.S. District Court Judge

Footnote

1Section 114(2) provides that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 42 U.S.C. 2000e-16 (d).

2The Court recognizes that as of April 25, 1990 it had concluded that "the liability phase of the class action is final, and the class litigation is no longer pending." *Trout v Garrett*, Civ. A. No. 73-55, 1990 WL 96647 at * 2 (D.D.C. Apr. 25, 1990). As discussed below, however, the award phase of the litigation was ongoing and was picking up steam when § 114(2) became effective. See e.g. Trout, 144 F.R.D. at 596-97

3See C. Dickens, Bleak House (1853).

Filed: 8/12/1998
Civil Action No. 73-55 (consolidated with 76-1206)
(HHG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE TROUT, CLARA PERLINGIERO et al,
Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,
Defendants.

ORDER

For the reasons set forth in this Court's Memorandum and Order of July 2, 1998, it is this 11th day of August, 1998 hereby -

ORDERED that the plaintiffs' motion for prejudgment interest on back pay awards is GRANTED; and it is further

ORDERED that within sixty (60) days of the date of this Order the plaintiffs shall submit to the Court a statement of the amount of interest due calculated using the prime rate.

Harold H. Greene
U.S. District Court Judge

Filed 11/19/2008

No. 07-5053
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT AND CLARA A. PERLIGIERO,
APPELLANTS

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,
APPELLEES

Before: SENTELLE, Chief Judge, and GINSBURG and BROWN, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on October 14, 2008, it is ORDERED that the petition be denied.

Filed 11/19/2008

No. 07-5053
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT AND CLARA A. PERLIGIERO,
APPELLANTS

v.

SECRETARY OF THE NAVY AND COMMANDING OFFICER NAVAL COMMAND SYSTEMS SUPPORT ACTIVITY,
APPELLEES

Before: SENTELLE, Chief Judge, and GINSBURG and BROWN, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED, that the petition be denied.

Per Curiam

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

November 1, 2004

Mr. Bradley G. McDonald
McDonald & Karl
900 Seventeenth Street, N.W.
Washington, DC 20006

Re: Yvonne G. Trout, et al v. Hansford T. Johnson, Acting Secretary of the Navy, et al. No. 03-22

Dear Mr. McDonald:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to file a petition for rehearing is denied.

Supreme Court, U.S.
FILED
MAY 14 2009
OFFICE OF THE CLERK

175 (2)

No. 08-1086

In the Supreme Court of the United States

YVONNE G. TROUT, ET AL., PETITIONERS

v.

B.J. PENN, ACTING SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' holding—consistent with every other court of appeals to consider the question—that Section 114(2) of the Civil Rights Act of 1991 (1991 Act) does not provide for prejudgment interest on a settlement award relating to conduct that preceded the 1991 Act's effective date conflicts with this Court's decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), interpreting the temporal reach of the Foreign Sovereign Immunities Act of 1976.

2. Whether petitioners should recover attorney's fees for unsuccessfully litigating their claim that Section 114(2) of the 1991 Act permitted an award of such prejudgment interest.

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In the Supreme Court of the United States

No. 08-1086

YVONNE G. TROUT, ET AL., PETITIONERS

v.

B.J. PENN, ACTING SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 540 F.3d 442. The opinion of the district court (Pet. App. 15a-34a) is reported at 464 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2008. A petition for rehearing was denied on November 19, 2008 (Pet. App. 41a). The petition for a writ of certiorari was filed on February 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1973, petitioners brought a class action lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that respondents had engaged in

gender discrimination. Pet. App. 2a-3a. After extensive litigation, the parties reached a settlement, which the district court approved on November 22, 1993. Under this 1993 consent decree, respondents agreed to pay petitioners backpay for the period 1970 to 1992. *Id.* at 3a. Under a 1995 stipulation, the parties explicitly reserved the issue of whether petitioners were entitled to an award of prejudgment interest on back pay and on attorney's fees for the period before November 21, 1991, the effective date of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071. Pet. App. 18a. Section 114(2) of the 1991 Act (105 Stat. 1079) provides for the same award of prejudgment interest against the federal government in Title VII cases "to compensate for delay in payment * * * [as is available] in cases involving nonpublic parties." 42 U.S.C. 2000e-16(d). Before the passage of the 1991 Act, this Court had held that interest on attorney's fees was *not* available in actions brought against the government under Title VII, because Congress had not expressly waived the United States' sovereign immunity to such a claim. See *Library of Cong.* v. *Shaw*, 478 U.S. 310, 318 (1986).

In orders issued in 1998, the district court concluded that respondents were required to pay prejudgment interest on back pay and on attorney's fees for the period prior to the passage of the 1991 Act. Pet. App. 18a. In 2001, the district court entered a final judgment awarding petitioners $8,627,276.50 in interest on back pay and $1,477,020.90 in interest on attorney's fees. *Id.* at 16a.

The court of appeals reversed. *Trout* v. *Secretary of Navy*, 317 F.3d 286, 292-293 (D.C. Cir.), cert. denied, 540 U.S. 981 (2003) (*Trout IV*). It concluded that its decision in *Brown* v. *Secretary of Army*, 78 F.3d 645 (D.C. Cir.), cert. denied, 519 U.S. 1040 (1996), was "dis-

positive" of petitioners' assertion that Section 114(2) required the Navy to pay prejudgment interest on backpay and on attorney's fees for the period before November 21, 1991. *Trout IV*, 317 F.3d at 287-288. The court noted the dual considerations motivating *Brown*: the rule of strict construction of waivers of sovereign immunity and the "rule of no-interest against the sovereign." *Id.* at 287. The latter, the court reasoned, "provides an important backdrop against which Congress acts when it waives sovereign immunity," and thus, courts "must presume that when Congress promulgates a waiver of sovereign immunity, it knows which principles will govern [courts'] interpretation of the waiver." *Id.* at 290 (citing *Brown*, 78 F.3d at 650). *Brown* was further informed, the court of appeals noted, by this Court's holding in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), which affirmed the "traditional presumption * * * 'against applying statutes affecting substantive rights, liabilities, or duties to *conduct* arising before their enactment.'" *Trout IV*, 317 F.3d at 291 (quoting *Landgraf*, 511 U.S. at 278).

The court of appeals rejected petitioners' attempt to distinguish *Brown* on the ground that respondents' liability here was not finally determined until the 1993 consent decree, which was after Section 114(2) became effective. *Trout IV*, 317 F.3d at 287-288. The court concluded that "the conduct underlying the complaint" rather than the procedural posture of the case governed whether *Landgraf*'s general presumption against retroactivity applied. *Id.* at 291. The court of appeals also reiterated its conclusion in *Brown* that there was "no evidence of congressional intent to apply [Section] 114(2) retroactively." *Id.* at 292. Thus, noting "the Supreme Court's instruction that a 'statement that a statute will become effective on a certain date does not sug-

gest that it has any application to conduct that occurred at an earlier date,'" the court of appeals held that the "district court erred in awarding prejudgment interest under [Section] 114(2) on backpay and attorneys' fees for periods prior to November 21, 1991." *Id.* at 292-293 (quoting *Landgraf*, 511 U.S. at 257).

Accordingly, because respondents had paid "interim attorneys' fees to counsel for the Trout class that is attributable to litigation of the prejudgment interest dispute, and because the final amount of costs and fees remains to be determined," the court of appeals remanded "for final determination of the costs and fees owed to the Trout class." *Trout IV*, 317 F.3d at 293.

Petitioners filed a petition for a writ of certiorari, which this Court denied. 540 U.S. 981 (2003). This Court also denied petitioners' motion for leave to file a petition for rehearing, which articulated petitioners' theory that this Court's intervening decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004) controlled the disposition of this case. 543 U.S. 976 (2004).

On remand to the district court and after the denial of petitioners' previous petition for a writ of certiorari, respondents moved for final determination of the attorney's fees and costs owed to the plaintiff class. Pet. App. 21a. Respondents also requested that the district court order petitioners and their counsel to refund the excess interim fees and costs, with interest. *Ibid.* Notwithstanding the decision in *Trout IV*, petitioners again sought prejudgment interest on back pay and on attorney's fees for periods prior to November 21, 1991, arguing—as they had in their unsuccessful motion to this Court—that *Altmann* demonstrated that *Trout IV* was wrongly decided. *Id.* at 22a.

The district court denied petitioners' motion, and granted respondents' motion for final determination of

the fees and costs owed to petitioners. Pet. App. 29a-31a. The district court further ordered petitioners to "refund $106,375.45 of the interim attorneys' fees and costs previously paid by the government in this action plus interest on that amount." *Id.* at 32a. The refunded attorney's fees and costs "relate[d] exclusively to the time spent and costs incurred [by petitioners] in connection with litigating the issue of the right to prejudgment interest for the period prior to the enactment of the Civil Rights Act of 1991." *Id.* at 22a.

The court of appeals affirmed. Pet. App. 1a-14a. The court rejected petitioners' assertion that because this Court held in *Altmann* that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, was applicable to conduct before its enactment, "*Altmann* now controls statutes that concern waivers of sovereign immunity" more generally. Pet. App. 6a. "It is clear," the court of appeals concluded, "that the Court's decision in *Altmann* was specific to the statute in that case." *Id.* at 9a (pointing to this Court's reliance in *Altmann* on "the history of foreign sovereign immunity" and Congress' language in the FSIA's preamble). The court of appeals noted that this Court has since observed that its conclusion in *Altmann* that the usual presumption against retroactivity announced in *Landgraf* did not apply to the FSIA "turned on the peculiarities" of the FSIA. *Id.* at 10a (quoting *Fernandez-Vargas* v. *Gonzalez*, 548 U.S. 30, 38 n.6 (2006)).

The court of appeals further determined that petitioners were not entitled to attorney's fees for unsuccessfully litigating their claim that Section 114(2) applied retroactively and entitled them to claim prejudgment interest on the settlement award for conduct before the 1991 Act's enactment. Applying *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the court concluded that

petitioners' unsuccessful interest claim was distinct from their successful sex discrimination litigation, and was thus not eligible for an attorney's fee award. Pet. App. 13a. The court of appeals declined to resolve whether its review of the district court's distinctness determination was *de novo* or for abuse of discretion, concluding that under either standard, the claims were distinct. *Ibid.*

ARGUMENT

The petition for a writ of certiorari should be denied. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. This Court previously denied petitioners' petition for a writ of certiorari seeking review of the court of appeals' determination that Section 114(2) of the 1991 Act does not give them a claim for prejudgment interest on backpay and on attorney's fees for any period before November 21, 1991, the effective date of the 1991 Act. *Trout* v. *Secretary of Navy*, 317 F.3d 286, 292-293 (D.C. Cir.), cert. denied, 540 U.S. 981 (2003); 1991 Act Pmbl., 105 Stat. 1071; § 402(a), 105 Stat. 1099. The issue did not warrant this Court's review then, and it does not now.

a. At the time of petitioners' earlier petition for a writ of certiorari, every court of appeals to consider the question had concluded that Section 114(2) affords no claim for prejudgment interest for conduct occurring before its effective date. Br. in Opp. at 5-6, *Trout* v. *Secretary of Navy*, 540 U.S. 981 (2003) (No. 03-22) (discussing *Brown* v. *Secretary of Army*, 78 F.3d 645 (D.C. Cir. 1996), cert. denied, 519 U.S. 1040 (1997); *Arneson* v. *Callahan*, 128 F.3d 1243 (8th Cir. 1997), cert. denied, 524 U.S. 926 (1998); *Woolf* v. *Bowles*, 57 F.3d 407 (4th

Cir. 1995); *Huey* v. *Sullivan*, 971 F.2d 1362 (8th Cir. 1992), cert. denied, 511 U.S. 1068 (1994); *Edwards* v. *Lujan*, 40 F.3d 1152 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995)). Since then, it appears no court of appeals has had reason to address the temporal reach of Section 114(2), which is unsurprising given that the issue can arise only where there is proven discrimination from decades ago, and only in cases against the government. There is not now, has never been, and is unlikely to be, a split of authority in the circuits on the question.

b. Petitioners claim that *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), marked such a departure in the Court's retroactivity analysis that the courts of appeals are now entirely mistaken in their uniform view about Section 114(2)'s retroactivity. This argument is incorrect on the merits.

As an initial matter, this Court saw nothing in the court of appeals' earlier application of *Brown* or *Landgraf* to this case that merited this Court's attention. Recognizing that, petitioners focus on the court of appeals' perceived misapplication of *Altmann*. See, *e.g.*, Pet. i (Questions Presented). But *Altmann* announced no principle that undermines these authorities, or makes the application of them to this case incorrect, or otherwise warrants further review by this Court.

As the court of appeals explained in the decision below, *Altmann* reaffirmed—rather than undermined—the "default rule of no retroactive effect of congressional enactments announced in *Landgraf*." Pet. App. 6a-7a (citing *Altmann*, 541 U.S. at 692-694). In particular, this Court noted that where a "statute affects rights, liabilities, or duties with respect to past conduct," the statute is not to have retroactive effect absent an explicit congressional directive. *Id.* at 7a (citing *Altmann*, 541 U.S. at 693-694). Where a statute "merely confers or ousts

jurisdiction," however, "application of a statute to * * * pending cases would be sanctioned." *Ibid.* This Court's determination in *Altmann* that the FSIA applies to pre-enactment conduct turned on its conclusion that the FSIA fell into neither category. *Ibid.*; see *Altmann*, 541 U.S. at 694 ("Though seemingly comprehensive, this inquiry [under *Landgraf*] does not provide a clear answer in this case."); *id.* at 696 ("*Landgraf*'s default rule does not definitively resolve this case."). Because *Landgraf*'s presumption against retroactivity was inconclusive in the "*sui generis* context" of the FSIA, this Court looked to the FSIA itself and the "circumstances surrounding its enactment," and found "clear evidence that Congress intended the Act to apply to preenactment conduct." *Id.* at 696-697.

This analysis of the FSIA certainly does not alter the basic rule of *Landgraf*. And in contrast to the peculiarities of the FSIA that confronted this Court in *Altmann*, the D.C. Circuit here found the traditional *Landgraf* retroactivity analysis readily applicable to Section 114(2). That section contains no indication that Congress intended it to apply retroactively to respondents' conduct in this case. See *Trout IV*, 317 F.3d at 290; *Brown*, 78 F.3d at 648. Moreover, by allowing a claim for prejudgment interest on awards issued for Title VII violations, Section 114(2) clearly increases the federal government's liabilities for past conduct. Cf. *Altmann*, 541 U.S. at 695 (stating that the "FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states" and that it "neither increases those states' liability for past conduct nor imposes new duties with respect to transactions already completed" (internal brackets and quotation marks omitted)). Petitioners do not argue otherwise. Thus, Section 114(2) falls squarely within *Landgraf*'s pre-

sumption against retroactivity, and recourse to the methods this Court utilized in *Altmann* to determine congressional intent is wholly unnecessary.

Petitioners are likewise mistaken in asserting that *Altmann* stands for the proposition that *Landgraf*'s antiretroactivity presumption no longer applies to any case involving any post-enactment assertion of immunity. Most obviously, *Altmann* has nothing to do with the United States' sovereign immunity. It is well-established that "foreign sovereigns have no right to immunity in our courts." *Altmann*, 541 U.S. at 688 (citing *Schooner Exch.* v. *McFaddon*, 7 U.S. (3 Cranch) 116 (1812)). By contrast, waivers of the United States' own sovereign immunity must be strictly construed, *e.g.*, *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), and so any ambiguity regarding the temporal scope of that immunity must be resolved in favor of the United States.

Nor, contrary to petitioners' suggestion, does *Altmann* suggest that the "relevant retroactivity event" in all cases involving any form of immunity is the assertion of that immunity. Pet. 14. This Court's conclusion that "assertions of [a foreign state's] immunity to suits" rather than the conduct underlying the assertion of immunity "are the relevant conduct regulated by the" FSIA did not inhere in the nature of an assertion of immunity. *Altmann*, 541 U.S. at 697. Rather, this conclusion stemmed from the FSIA's particular language and purposes. *Ibid.* ("*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.") (quoting 28 U.S.C.

1602).[1] Section 114(2) has no such reference to the federal government's *invocation* of immunity, and thus does not signal Congress's intent to make the invocation of immunity—rather than the government's underlying conduct at which Title VII and Section 114(2) are targeted—the "relevant conduct regulated by the" 1991 Act. *Ibid.*

c. Even if the Court believed petitioners' novel interpretation of *Altmann* might have merit, the Court's review of the issue would be better informed by awaiting additional decisions from other courts of appeals on *Altmann*'s relevance to retroactivity analysis of waivers of sovereign immunity. Petitioners do not identify—and the United States is unaware of—any split of authority in lower courts on the application of *Altmann* to statutes that waive the United States' sovereign immunity. Indeed, the decision below may well be the only court of appeals opinion addressing the issue in any detail. In such a sensitive area, with such a wide range of statutes

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[1] In so deciding, this Court noted that its "approach to retroactivity *in this case* thus parallels that advocated by Justice Scalia in his concurrence in *Landgraf*." *Altmann*, 541 U.S. at 697 n.17 (emphasis added). This Court did not suggest, as petitioners claim (Pet. 24), that it was abandoning the *Landgraf* presumption in all cases involving an assertion of immunity in favor of Justice Scalia's concurrence. Rather, the Court simply observed that its interpretation of the FSIA's particular language and purposes tracked Justice Scalia's views in *Landgraf*.

Moreover, even if Justice Scalia's *Landgraf* concurrence were controlling, his focus on "relevant activity that the rule regulates" would support the court of appeals' conclusion here, *Altmann*, 541 U.S. at 697 n.17 (quoting *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring)), because the "relevant retroactivity event" for Section 114(2) is the conduct underlying the putative Title VII violation. See *Trout IV*, 317 F.3d at 291-292 (concluding that "the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in" determining whether Section 114(2)'s application is retroactive).

permitting the imposition of liability on the government, this Court may benefit from the views and experience of the lower courts in other cases.

Finally, the retroactivity of the statute involved here is of diminishing—if not already vanished—importance. As petitioners admit, their case is of almost uniquely "Jarndyceian" duration. Pet. 7. The proper interpretation of Section 114(2)'s temporal reach may have been significant in a substantial number of cases around the time of the 1991 Act's passage, as evidenced by the cluster of court of appeals cases from the mid-1990s. See pp. 6-7, *supra*. But today, the issue is irrelevant except in the rare case that reaches back to discrimination nearly two decades past. The singular nature of petitioners' case is underscored by the fact that the Eighth Circuit's 1997 decision in *Arneson* appears to be the last time anyone besides these petitioners raised the issue. An issue with such limited relevance does not merit this Court's attention.

2. The court of appeals' determination that petitioners were not entitled to attorney's fees as a prevailing party for unsuccessfully litigating the prejudgment interest issue also does not merit further review. The decision is correct, does not conflict with the decisions of this Court or any other court of appeals, and arises in an unusual context that would allow the Court to offer, at most, limited guidance on the legal issue petitioners assert is presented by their case.

a. In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), this Court held that attorney's fees should not be awarded for work performed on an unsuccessful "claim that is distinct in all respects from [a plaintiff's] successful claims." *Id.* at 440. Both the district court and the court of appeals determined that under the factors set out in *Hensley*, petitioners' unsuccessful prejudgment interest

litigation was "distinct" from its litigation on the underlying merits. Pet. App. 10a-13a, 26a-28a. This Court explained in *Hensley* that the only unsuccessful claims for which a plaintiff may still be eligible for attorney's fees are those related to successful claims. 461 U.S. at 435. Such related claims "involve a common core of facts" or are "based on related legal theories." *Ibid.* It is this sort of lawsuit that "cannot be viewed as a series of discrete claims" for the purpose of determining attorney's fees to a prevailing party. *Ibid.*

As the court of appeals and district court correctly concluded, under *Hensley*, petitioners' unsuccessful litigation on the prejudgment interest issue is distinct from their earlier, successful litigation on the merits that culminated in the consent decree. The retroactivity of Section 114(2) shares no common facts or legal theories with petitioners' underlying claims of sex discrimination. Nor was "[l]itigation of the interest issue * * * inextricably intertwined with the sex discrimination litigation—it was not necessary to obtain or protect any relief awarded, nor was it necessary to preserve the integrity of the Consent Decree as a whole." Pet. App. 13a; cf. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 556 (1986) (attorney's fees could be awarded for work during post-judgment proceedings if such work is "useful" and of a type "ordinarily necessary" to secure the litigation's final result). Thus, the lower courts correctly applied *Hensley*, and petitioners' assertion that the court of appeals "disregarded" this Court's precedent (Pet. i) is incorrect.

Petitioners contend that *Hensley* drew a bright line between "claim[s]"—which petitioners equate to "cause[s] of action" (Pet. 30-31)—on the one hand, and "contentions," "grounds," and "issues" on the other, and that attorney's fees should "be awarded to a prevailing plain-

tiff on a per 'claim' basis" except where several claims together might be seen as part of "one large claim." Pet. 27, 28, 29.

Hensley created no rule that a proper attorney's fee award must include time spent litigating unsuccessful "'issues' or 'contentions' or 'grounds.'" Pet. 29. Such a formalistic use of the words "claim" and "issue" would be inconsistent with *Hensley* itself. In *Hensley*, this Court indicated that only a partial award would be warranted on a single constitutional cause of action about plaintiffs' treatment and conditions at the defendant hospital if plaintiffs there had "prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive." 461 U.S. at 436. Moreover, without comment, this Court discussed circuit court holdings using the word "issues" as synonymous with petitioner's conception of "claims." See *id.* at 438 n.14 (discussing the focus on the "particular legal issue on which relief had been granted") (citing *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978)); *id.* at 433 (discussing the typical analysis of success on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)).

Moreover, on petitioners' logic, a plaintiff's pursuit of all forms of relief related to a single cause of action would be compensable, no matter how unrelated or disproportionate to the success actually achieved. Such a rule would conflict with this Court's emphasis on setting fee awards in proportion to the success a plaintiff obtains. Rather than creating a formal distinction between claims and issues, this Court emphasized a district court's "discretion in determining the amount of a fee award" by examining the relief obtained "in compari-

son to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 437, 440. Indeed, this Court stressed that "[t]here is no precise rule or formula" in determining a fee award, and that district courts "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for" a plaintiff's "limited success." *Id.* at 436-437. The touchstone is that the work for which a fee is awarded must be proportional to the relief obtained. See *id.* at 436 (requiring a determination that "expenditure of counsel's [compensated] time was reasonable in relation to the success achieved"). The lower courts here correctly recognized that they need not—and ought not—award petitioners fees for work performed on the Section 114(2) issue, which did not contribute in any way to the success obtained in the consent decree.

b. Nor does the court of appeals' application of *Hensley* to this case conflict with any other precedent of this Court or other courts of appeals. The court of appeals' decision is consistent with *Commissioner* v. *Jean*, 496 U.S. 154 (1990). Petitioners suggest that *Jean* stands for the proposition that once a party prevails in any aspect of litigation, it is entitled to fees "for the entire action." Pet. 33. But this Court reiterated in *Jean* its earlier holding in *Hensley* that the "prevailing party" requirement "brings the plaintiff only across the statutory threshold" and that "[i]t remains for the district court to determine what fee is 'reasonable'" under the success-focused inquiry set out in *Hensley*. *Jean*, 496 U.S. at 160-161 (citation omitted).

Notwithstanding petitioners' string citation to ten other courts of appeals, Pet. 30-31, not a single case petitioners cite stands for the proposition that all work associated with a single cause of action must be compensated if a plaintiff wins any relief in connection

with that cause of action.[2] Thus, there is no conflict in

[2] Most of these cases do not even use the phrase "cause of action," and none suggests that every issue unsuccessfully litigated in association with a particular cause of action must be included in the calculation of a fee award. See *Green* v. *Torres*, 361 F.3d 96, 98 (2d Cir. 2004) (noting that under *Hensley* where claims "involve a common core of facts or are based on related legal theories," and are therefore not severable, "attorney's fees may be awarded for unsuccessful claims as well as successful ones") (internal citation and brackets omitted); *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 137 (3d Cir. 1984) (remanding where a district court had "fail[ed] to consider the interrelated nature of the lawsuit as a whole"); *Johnson* v. *Hugo's Skateway*, 949 F.2d 1338, 1352 (4th Cir. 1991) (affirming district court's refusal to award fees against one defendant for successful claims brought against a different defendant); *Pruett* v. *Harris County Bail Bond Bd.*, 499 F.3d 403, 418 (5th Cir. 2007) (remanding to allow the district court to award fees appropriate to plaintiffs' partial success), cert. denied, 128 S. Ct. 1227, and 128 S. Ct. 1290 (2008); *Imwalle* v. *Reliance Med. Prods., Inc.*, 515 F.3d 531, 555 (6th Cir. 2008) (noting the relevance to the fee award that "[c]ommon facts" underlay plaintiff's claims, which also had "significant overlap in the legal theories"); *Ustrak* v. *Fairman*, 851 F.2d 983, 988 (7th Cir. 1988) ("A partially prevailing plaintiff should be compensated for the legal expenses he would have borne if his suit had been confined to the ground on which he prevailed plus related grounds within the meaning of *Hensley*."); *Minnesota Supply Co.* v. *Raymond Corp.*, 472 F.3d 524, 545 (8th Cir. 2006) (remanding to determine whether claims "are distinct or whether they are related in such a way that much of the time of counsel was devoted to the litigation as a whole," and if the latter, "to consider the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation") (internal quotation marks omitted); *McCown* v. *City of Fontana*, 550 F.3d 918, 924 (9th Cir. 2008) (holding that "attorney's fees awarded under 42 U.S.C. § 1988 must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims"); *Browder* v. *City of Moab*, 427 F.3d 717, 723 (10th Cir. 2005) (remanding to district court because it "gave no rationale for its decision" in awarding reduced fees); *Quintana* v. *Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005) (concluding that where a plaintiff's arguments supporting each claim were distinct, a district court could "weigh and assess the amount of attor-

the circuits to be resolved by this Court's review of this case.

Petitioners' assertion that the court of appeals' decision raises "troubling public policy and ethical concerns" because it does not compensate petitioners' counsel "for services they were ethically obligated to provide after the entry of the Consent Decree," Pet. 35, is unavailing. Congress's provision that fees are awarded only for a plaintiff's successes necessarily means that some work that counsel is ethically obligated to do, having agreed to represent a plaintiff, may go uncompensated. See *Hensley*, 461 U.S. at 436 (stating that "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill" and that "the most critical factor is the degree of success obtained").

c. Even if this issue were otherwise worthy of this Court's attention, this case would be an undesirable vehicle for addressing the question petitioners present.

First, disputes about the retroactivity of certain incremental claims for relief are quite unusual, and disputes about the attendant attorney's fee award rarer still. Given the unusual factual context of this case, review here would be expected to give only limited guidance to lower courts.

Second, the court of appeals found it unnecessary to decide the applicable standard of appellate review, holding that it would have reached the same result on *de*

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ney's fees attributable exclusively to [plaintiff's] frivolous retaliation claim"); *Andrews* v. *United States*, 122 F.3d 1367, 1376 (11th Cir. 1997) (remanding for a recalculation of fees where a "district court did not consider that plaintiffs prevailed on only one of their three [Comprehensive Environmental Response, Compensation, and Liability Act of 1980] claims and their monetary award on that claim was quite small").

novo review or review for abuse of discretion. Pet. App. 13a. This is a threshold issue the Court might have to decide before reaching the merits, and it would do so without the benefit of a reasoned decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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STATUTES

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I. THE APPLICABILITY OF *ALTMANN*

A.

Respondent misconstrues the key point in Petitioners' argument, that the Court's opinion in *Austria v. Altmann*, 541 U.S. 677 (2004) ("*Altmann*") is an application and refinement of the analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) ("*Landgraf*"). Petitioners never claim that *Altmann* "marked such a departure in the Court's retroactivity analysis." *See* Opposition at 7. Since "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes," *Landgraf*, 511 U.S. at 280, there is no reason to believe that the "relevant retroactivity event" for Section 114(2) of the 1991 Act is the same as for other sections of the 1991 Act. The *Altmann* Court's adoption of Justice Scalia's analysis of how to determine whether a waiver of sovereign immunity is retroactive is fully consistent with *Landgraf*. The Court should look to *Altmann* to resolve whether Section 114(2) of the Act applies to this litigation and determine "the relevant retroactivity event," where the United States asserts sovereign immunity after passage of the Act.

In *Landgraf*, the Court observed that: "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269 (footnote and parallel citation omitted). Under *Altmann*, the "relevant retroactivity event" is the assertion of the defense of sovereign immunity to the payment of prejudgment interest. Under the rule of decision announced in *Altmann*, the application of the Civil Rights Act of 1991 to pre-statute actions does not violate the presumption against retroactive legislation

where the government first asserts a defense of sovereign immunity after the passage of the Act. 541 U.S. at 692-700. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990) (judgment is the point at which "expectations with respect to interest liability were fixed"). Since the "relevant retroactivity event" regulated by Section 114(2) of the Act is the assertion of sovereign immunity, the application of Section 114(2) of the Act waiving sovereign immunity of the United States to the November, 1993 judgment is not impermissibly retroactive.

Respondent claims that Justice Scalia's "focus on 'relevant activity that the rule regulates' would support the court of appeals' conclusion here because the 'relevant retroactivity event' for Section 114(2) is the conduct underling the putative Title VII violation." Opposition at 10, n 1 (citations omitted). In making this argument, Respondent cites the 2003 opinion by the D.C. Circuit, but offers no explanation as to why "the conduct underling the putative Title VII violation" should be considered the "relevant retroactivity event," rather than the date on which a party asserts a defense of sovereign immunity. This is certainly contrary to the view of the *Altmann* Court. *Altmann*, 541 U.S. at 696, n. 17 (the "relevant retroactivity event" for determining whether the application of a waiver of sovereign immunity is retroactive or retrospective is not determined by the dates of the conduct at issue.) Respondent offers no principled basis for arguing that the "relevant retroactivity event" should be different where the United States, rather than a foreign government, asserts the defense of sovereign immunity, where both statutes "take effect upon

enactment."[1] *See* Section 402(a) of the Civil Rights Act of 1991. *See Landgraf*, 511 U.S. at 293 (for jurisdiction cases the "relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.") (Scalia, J. concurring).

B.

Petitioners do not argue that the other courts of appeal addressing the applicability of Section 114(2) "are now entirely mistaken in their uniform view about Section 114(2)'s retroactivity." *See* Opposition at 8. Rather, Petitioners assert that these decisions decided prior to *Altmann* do not address the precise issue raised here, that the application of Section 114(2) to this litigation is not a retroactive application of the statute under *Altmann*.

C.

During the intervening period of more than fifteen years since *Landgraf*, the Court has addressed on numerous occasions the impact of a change in the law on actions that occurred prior to the passage of the new law and, in particular, whether the application of a new law is retroactive and whether the statutory change applies to cases already pending in the court. *See* Petition at 12.

This Petition raises important questions as to whether a change in statutory law applies to a specific

[1]As this Court observed: "To the contrary, we understand the instruction that the provisions are to 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Landgraf*, 511 U.S. at 280.

set of circumstances or to a case pending in the federal courts and what is the "relevant retroactivity event" for determining whether the new law applies. The Court should grant review because of the importance of the issue and because of the need to provide additional guidance to courts of appeal as to when the default rule in *Landgraf* does **not** apply. Petitioners urge the Court to rule that under *Altmann* the "default rule" in *Landgraf* does not apply to defenses of sovereign immunity, whether asserted by foreign governments under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), or by the United States. The "relevant retroactivity event" was the assertion of the sovereign immunity defense to the payment of pre-November 21, 1991, prejudgment interest after the entry of final judgment which occurred two years after the effective date of Section 114(2). Since the application of Section 114(2) to this case is not "retroactive," the district court had the discretion under Section 114(2) to award pre-November 21, 1991 prejudgment interest for delay in payment of backpay and attorney's fees.

The Court should grant the Petition to consider whether the *Altmann* rule of decision applies to this case and to further the public policy goals of the Equal Employment Opportunity Act of 1972, "to eradicate 'entrenched discrimination in the Federal service.'" *Chandler v. Roudebush*, 425 U.S. 840, 841 (1976) (citations omitted). In the absence of an award of prejudgment interest, Petitioners will not be made whole and will receive only a partial remedy for the discrimination that suffered, a result that is contrary to the teachings of this Court. *E.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975) ("the

compensation shall be equal to the injury") (citation omitted); *see also AT&T Corp. v. Hulteen*, 556 U.S. ___, 2009 WL 1361539 (May 18, 2009) ("societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities") (citations omitted), (Ginsburg, J. dissenting); *Montana v. Kennedy*, 366 U.S. 308, 311 (1961) (*certiorari* was granted "in view of the apparent harshness of the result entailed").

II. APPLICATION OF *HENSLEY V. ECKERHART*

Initially, we note that Respondent confuses entitlement to an award of attorney's fees with the amount of attorney's fees that may be awarded. Respondent misconstrues Petitioners' claim, because Petitioners do not argue that the court "must" compensate attorneys for "time spent litigating unsuccessful 'issues' or contentions' or 'grounds.'" Opposition at 13. Nor do Petitioners claim that their "pursuit of all forms of relief related to a single cause of action would be compensable," *id.*, no matter how unrelated. Petitioners do not dispute that *Hensley v. Eckerhart*, 461 U.S. 424 (1983) ("*Hensley*") mandates that fee awards be related to the success obtained. *See* Opposition at 14.

"Once civil rights litigation materially alters the legal relationship between the parties, 'the degree of the plaintiff's overall success goes to the reasonableness' of the fee award under *Hensley v. Eckerhart.*" *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (citation omitted). "[T]he **degree** of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a

reasonable fee, not to eligibility for a fee award at all." *Tex. State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 790-93 (1989) (emphasis in original).

A.

The Court should grant *Certiorari* because the decision below is contrary to the decisions from eleven other courts of appeal. If the D.C. Circuit had followed the analysis of the other circuits, it would have recognized that interest could not be a separate "claim" from the backpay on which the interest was based. Prejudgment interest is an integral part of the relief used to make a winning plaintiff whole. *Kansas v. Colorado*, 533 U.S. 1, 10-11 (2001) (citations omitted). Thus, the claim for interest can not be *"distinct in all respects* from [the plaintiff's] successful claims," *Hensley*, at 440 (emphasis added), no matter what the standard of review.[2] No cause of action for interest

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[2]Respondent also argues that were this Court to accept the Petition, it might have to decide what it characterizes as a "threshold issue" of "the applicable standard of appellate review" prior to "reaching the merits." Opposition at 16-17. Review of whether plaintiffs continue to be "prevailing parties" entitled to apply for costs and attorney's fees is *de novo*. *Jenkins v. State of Missouri*, 127 F.3d 709, 713 (8th Cir. 1997) (citations omitted); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

Under the circumstances present here, where the court of appeals ruled that Petitioners were no longer "prevailing parties" on the ground that interest is separate and "distinct in all respects" from back pay, "an error of law is always tantamount to an abuse of discretion." *See De Jesus Nazario v. Rodriguez*, 554 F.3d 196,

could be raised in a separate lawsuit because interest is never separate and "distinct in all respects" from the claim seeking backpay. Without an award of backpay, there is nothing on which to base an award of prejudgment interest.

The Court should grant the Petition for *Certiorari* because the D.C. Circuit's failure to follow *Hensley*'s distinction between claims and issues creates a split in the circuits that this Court should resolve. The effect of the lower court's ruling was to require the plaintiff class to demonstrate a second time that the plaintiff class was a "prevailing party," this time on the narrow issue of pre-1991 interest, in order to again cross the "prevailing party" threshold to be entitled to request reasonable attorney's fees for legal services performed on this issue. Thus, the ruling is contrary to *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990). Since Petitioners retained their status as "prevailing parties," they were entitled under *Hensley* and its progeny to be considered for reasonable attorney's fees and costs for post-remand services.

B.

The district court has the power to award attorney's fees and costs to prevailing parties for services reasonably rendered after entry of the Consent Decree, even if Petitioners do not prevail on their principal argument that they are entitled to pre-November 21, 1991 prejudgment interest under

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199 (1st Cir. 2009) (citations omitted). Thus, the D.C. Circuit's decision not to decide the standard of review should not affect the Court's decision on whether to grant review.

Altmann. *E.g.*, *Jenkins v. State of Missouri*, 127 F.3d at 714.

Once plaintiff class members become "prevailing parties" by securing underlying court-ordered relief, their success or failure in post-judgment enforcement actions or motions is only one factor to consider in determining whether plaintiffs are entitled to attorney's fees for these services. *Cody v. Hillard*, 304 F.3d 767, 773-775 (8th Cir. 2002). Thus, the lower courts here should have considered the success of the plaintiff class as a whole in determining whether an award of attorney's fees for post-Judgment services was appropriate. Because Petitioners achieved the maximum success possible when the 1993 Consent Decree awarded Petitioners every dollar in backpay recommended in the report by their expert witness, the district court may exercise its discretion to make an award of attorney's fees for litigation on issues that arose after entry of judgment, regardless of the outcome of a particular motion.

Respondent fails to address decisions by other courts of appeal awarding "prevailing" class action plaintiffs reasonable attorney's fees for litigation on issues that arose after entry of decrees, even when the civil rights plaintiffs lost on those particular issues. *E.g.*, *Plyler v. Evatt*, 902 F.2d 273, 280-281 (4th Cir.1990); *Johnson v. City of Tulsa, Oklahoma*, 489 F.3d 1089, 1111 (10th Cir. 2007); *see* Petition at 34-35. Under these decisions, Petitioners would have an opportunity to apply for an award of attorney's fees from a district court that recognizes its power to exercise its discretion to consider Petitioners' success in the litigation as a whole in deciding whether to award attorney's fees and costs.

The Court should grant *Certiorari* to bring the D.C. Circuit into compliance with *Jean* and to resolve a split in the circuits created by the lower court, whose ruling differs from the approaches taken by other circuits as to the standards for compensating class counsel for services following entry of a consent decree.

C.

Respondent's Opposition to granting the Petition is based on several errors. *See* Opposition at 11. As noted above, the decisions below are contrary to *Hensley* and the decisions of eleven other courts of appeal. Under the correct view of *Hensley*, the interest issue can not be a separate and "distinct in all respects" claim from the backpay claim on which Petitioners prevailed. The lower courts misread *Hensley*.

Petitioners' argument is directed to the failure of the district court to recognize it had the discretion to consider their motion for the award of attorney's fees. Petitioners argue they were entitled to apply to the district court for attorney's fees, which should have considered their application in light of their overall success on the merits, instead of proceeding under the erroneous legal view that the court lacked all authority to award any attorney's fees for work during the interest phase of the litigation, or that it was required to disregard Petitioners' overall success on the merits in addressing the fees issue.

Petitioners submit the district court should have considered their claim for attorney's fees based on their overall level of success, not just the outcome of a particular post-decree motion. The district court could not fulfill its duty to determine what fee is "reasonable" under *Hensley*, because the district judge did not

recognize he had the authority to award any fee because he erroneously concluded Petitioners lost their status as "prevailing parties." *See* App at 28a.

Contrary to Respondent's contention, Petitioners do not assert that all of their work "must be compensated if a plaintiff wins any relief in connection with that cause of action." *See* Opposition at 14-15 (footnote omitted). Rather, Petitioners seek to have the district court exercise its discretion under *Hensley* to consider its application for fees under correct legal standards.

D.

Respondent opposes granting review of the second question because this issue arises in "an unusual context...." Opposition at 11. Later, Respondent asserts: "Even if this issue were otherwise worthy of this Court's attention, this case would be an undesirable vehicle for addressing the question petitioners present." Opposition at 16. These statements are incorrect and reflect the Respondent's erroneous view of the issues presented.

Petitioners ask this Court to decide whether they remain "prevailing parties" under *Hensley* and its progeny. Resolution of this issue turns on the correct interpretation of *Hensley*, not on the type of relief sought by the plaintiff class. The fact that Petitioners sought additional relief in the form of pre-November, 1991 prejudgment interest under the Civil Rights Act of 1991 is irrelevant to the *Hensley* issue, which should be treated like any post-Judgment motion.

Respondent also states "disputes about the attendant attorney's fee award [are] rarer still." Opposition at 16. To the contrary, the issue of

awarding attorney's fees for post-judgment services frequently arises in class action litigation, in the cases cited above, as well as in cases cited by the United States and by Petitioners in the court of appeals. *See also, e.g., Gautreaux v. Chicago Housing Authority*, 491 F.3d 649 (7th Cir. 2007); *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004). This Petition raises an issue relating to the standards for post-Judgment award of attorney's fees and costs that extends far beyond specific facts presented here. Granting review would provide guidance to lower courts on the correct interpretation of *Hensley* and the proper standard for awarding post-judgment attorney's fees in class actions for post-Judgment services and correct an egregious error by the lower court. *See Ash v. Tyson Food, Inc.*, 546 U.S. 454, 456-458 (2006) (granting *certiorari*, vacating, and remanding where the error in the lower court's opinion is obvious).

Allowing the court of appeals' decision to stand runs the risk of discouraging counsel from providing diligent post-judgment representation to prevailing parties in class actions and thus defeating the public policy of allowing statutory fees to prevailing parties in civil rights cases. *Jaffe v. Redmond*, 142 F.3d 409, 414, 416-418 (7th Cir. 1998); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 526 (7th Cir. 1995).

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve the important legal issue of how to identify the "relevant retroactivity event" which determines whether a statute waiving sovereign immunity is "prospective."

Review of the second question should be granted to resolve the conflict between the court of appeals below and the other eleven circuits on whether under *Hensley* interest can be separate and "distinct in all respects" from a Title VII backpay award when determining eligibility to apply for attorney's fees.

Respectfully submitted,

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